CALIFORNIA COASTAL COMMISSION
CENTRAL COAST DISTRICT OFFICE
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
(831) 427-4863

Th12d

Filed:	7/3/2003
49th day:	8/21/2003
180th day:*	12/30/2003
*PSA deadline extended to:	3/29/2004
Staff:	D.Carl
Staff report prepared:	2/26/2004
Hearing date:	3/18/2004
Hearing item number:	Th12d

COASTAL DEVELOPMENT PERMIT APPLICATION

Application number.....**3-03-035, Williams Beach SFD**

Applicant.....E.J. Williams

Project location .....Part sandy beach and part fill area on the beach between East Cliff Drive and the Monterey Bay near Moran Lake in the unincorporated Live Oak area of Santa Cruz County (2-2796 East Cliff Drive, APN 028-481-03).

Project description.....Construct a three-story, flat-roofed, 28-foot (above the grade of East Cliff Drive), roughly 3,000 gross square foot residence (with a partially cantilevered upper story and upper story deck, middle "void" story, and bottom story garage) with a foundation consisting of 5-foot wide and 3-foot thick concrete perimeter beams on top of four 54-inch diameter and 44-foot deep concrete caissons, with eight concrete caissons atop the garage perimeter beams supporting the remainder of the structure. Project also includes a driveway, utility connections, and landscaping between the residence and East Cliff Drive.

File documents.....Santa Cruz County certified Local Coastal Program (LCP); California Coastal Commission Monterey Bay ReCAP; California Coastal Commission coastal development permit (CDP) and emergency permit files 3-81-063 (Formico and Poco), 3-83-051-G (Formico), 3-97-002-G (Formico), 3-97-005-DM (Williams), 3-02-033 (Williams), 3-03-001-G (Williams), and 3-03-024 (Williams); Santa Cruz County CDP file 00-0189 (Williams).

Staff recommendation ...**Denial**

Summary of Staff Recommendation: The Applicant proposes to construct a single family residence just seaward of East Cliff Drive and Moran Lake County Park at 26th Avenue Beach on a small area consisting of both beach sand and historic fill and rock (unpermitted in the area where development is proposed) on top of beach sand. The site is located within the Live Oak beach area of Santa Cruz County in the Coastal Commission's retained permit jurisdiction. The Applicant owns the existing adjacent beach fronting residence and the proposed structure would be located immediately adjacent to it (within about ten feet) and further seaward than it. The structure would include three stories set atop a concrete foundation structure consisting of caissons extending below grade into bedrock. The garage

carport would be at approximately the grade of adjacent East Cliff Drive with the caissons extending roughly 50 feet below that and the upper stories extending 28 feet above it. The walls around the garage and void area above it have been designed to come apart in a storm event that flooded the site and the structure in order to allow storm surge to flow through the structure under the uppermost floor. The upper floor includes an enclosed habitable area and an almost triangular cantilevered exterior deck. Only the upper floor would include habitable space. The middle story would be an enclosed empty space, and the lower story would be a mostly enclosed storage area carport (please see proposed site plans and elevations in exhibit D).

The Coastal Act requires that risks be minimized, long-term stability and structural integrity be provided, and that development be sited, designed, and built to allow for natural shoreline processes to occur; all of this is required to be accomplished without the benefit of protective devices or other shoreline altering construction. The site is located at the beach-ocean interface at a low elevation and it is made up of highly erodable soils, including beach sand. It is extremely vulnerable to coastal hazards, and its stability is tenuous (note that the only previous single family residence to be located on the site was destroyed by storms in 1983 within about ten years of its initial construction). Because of this, the proposed residence requires an extraordinary foundation structure to protect the upper floor (the only living space) from these hazards. However, most of the remainder of the proposed development is designed to be destroyed by storm surge that flooded the site and these structures, and then to be replaced as necessary following such storms. The "disposable" elements of the project include: the lower level walls, framing, connectors, and concrete plank/beam flooring; all materials located in the bottom level garage area (such as vehicles and other things typically stored in a garage like garbage cans, bicycles, household tools, paints, oil, solvents, etc.); the driveway (whether a concrete plank/beam bridge or pavement on fill grade); and potentially the utility connections (such as the sewer line connecting to the County's sanitary sewer in East Cliff Drive). Even in smaller storms, storm surge would be expected to flood the lower garage floor and damage the driveway access resulting in similar (if lesser by degree) effects. The proposed project does not minimize risk, and does not provide stability and structural integrity. Rather, the project is itself a hazard (to other persons and property nearby, including public beach, park, and road areas) because significant portions of it would be washed into the surrounding area in major storms. Moreover, the extraordinary foundation system is a protective device that would negatively affect natural shoreline processes, and this type of structure is not allowed with new residential development. Thus, the project is inconsistent with the Coastal Act's stability and shoreline development requirements.

The Coastal Act also requires that the public viewshed be protected as a resource of great importance, and that development in highly scenic areas be subordinate to the character of the setting. The proposed development site is located along East Cliff Drive (the first through public road and a heavily used recreational and other access facility), immediately seaward of the County's Moran Lake County Park, directly atop 26th Avenue Beach, and immediately fronting the Monterey Bay National Marine Sanctuary. As a result, the site is located within a significant public viewshed and a highly scenic (if urbanized) area used by a large number of people. The residential structure would significantly block coastal views to and from the County Park, East Cliff Drive, the beach, and offshore in an area where such views are already limited by the existing development pattern. In addition, the proposed structure is

large for the site, with a cantilevered upper story that makes it even more imposing on adjacent public use areas, and its angular and flat-roofed design would be incompatible with the character of its setting. As such, the remaining public views (i.e., those that aren't blocked completely) would be degraded and its character worsened, including the character of the surrounding developed environment.. During and after storms, materials from the development would also be scattered in and around the site to the further detriment of the public viewshed. In sum, the proposed project would block much of the view of the shoreline with a large structure out of character with nearby homes and not subordinate to the beach setting. The project is inconsistent with the Coastal Act's viewshed requirements.

The Coastal Act also requires that public access and recreational opportunities be both maximized and protected against inappropriate development that would interfere with them. The site is located in the middle of several significant and highly used public recreation and access resources including the sandy beach, nearshore (and world-class) ocean recreation area, East Cliff Drive, and the County Park. In addition, and given that the project site is occupied mostly by sandy beach and also includes a portion of East Cliff Drive on it (subject to a County-owned easement), the project site itself is a part of this recreational use area. In fact, evidence submitted during the course of an ongoing prescriptive rights investigation indicates that at least some of the public has used portions of the subject as if it were public for a variety of recreational access pursuits continuously and regularly since at least 1961 (although use was necessary limited to the margins of the site for the 10 years when a home was present here in the 1970s). The proposed project would block the public from using the site in the way it has been used for a number of years, and would block use of the roadway easement. In addition, the proposed structure would loom over the remaining beach, nearshore, road, and Park and diminish the value of these recreational use areas. Finally, during and after storms, materials from the project would be scattered in and around the site and adjacent public areas blocking and degrading these areas, including degradation of water quality. The project is inconsistent with the Coastal Act's public recreational access requirements.

The Coastal Act requires protection and preservation of habitat and marine resources. Just inland of the site is Moran Lake County Park and the wetland proper, and just seaward is the Monterey Bay National Marine Sanctuary. The project would, during the type of storms described above, lead to water quality degradation in Moran Lake (where the County is already struggling to upgrade its water quality) and the Monterey Bay to the detriment of habitat and marine resources. In addition, the project would also introduce a large residential structure (and thus additional noise, lights, and increased activities associated with it) and non-native and invasive landscape species adjacent to the inland habitat area of Moran Lake leading to habitat impacts. In sum, the project would lead to degradation of wetland and Bay resources. The project is inconsistent with the Coastal Act's marine resources and habitat requirements.

Because the entire project site is unstable, unsafe, extremely visible, and is located in the middle of a significant public recreational access area adjacent to ESHA inland and the Monterey Bay, the proposed project is significantly out of conformance with the Coastal Act. Staff is unaware of any modifications that could make a residential structure at this site consistent with the Coastal Act. As a result, Staff recommends that the proposed project be denied. Project denial, however, does not preclude the

Applicant from applying for some other use of the site, such as some minor extension or more useable configuration of the deck from the adjacent parcel, or the placement of additional shoreline armoring (e.g., like the rip-rap directly seaward of the existing house that is already permitted) to protect the house on the adjacent lot.

When the Commission denies a project, the question sometimes arises whether the Commission's action constitutes a "taking" of private property without just compensation. In this circumstance, the Commission must evaluate whether its action might constitute a taking because Coastal Act Section 30100 prohibits the Commission from taking private property. The denial of the Applicant's project, however, would not constitute a taking because: (1) a taking claim is not ripe; (2) denial would not constitute a taking under any of the tests that the courts have identified for establishing a taking; and (3) the project, if approved, would constitute a public nuisance. Consequently, the Commission's denial of the project would be consistent with Section 30100.

In conclusion, Staff recommends that the Commission deny this coastal development permit application.

Action Deadline Note: The Permit Streamlining Act (PSA) deadline for Commission action on this application is March 29, 2004. This date represents the already extended PSA deadline (by previous mutual agreement of the Applicant and Staff). Because the PSA does not allow for an additional extension of this deadline, it cannot be further extended (even if the Applicant and the Commission were to agree to further extension). Thus, unless the Applicant withdraws the application, the Commission must take action on it at the March meeting or it will be deemed approved by operation of law.

Report Contents

I. Staff Recommendation on CDP Application

Staff recommends that the Commission, after public hearing, **deny** a coastal development permit for the proposed development.

Motion. I move that the Commission approve Coastal Development Permit Number 3-03-035 for the development proposed by the Applicant.

Staff Recommendation of Denial. Staff recommends a **no** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution To Deny The Permit. The Commission hereby denies a coastal development permit for the proposed development on the grounds that 1) the development will not conform with the policies of Chapter 3 of the Coastal Act, and 2) denial of the proposed development a) will not constitute a taking of private property for public use without payment of just compensation, and b) is an action to which the California Environmental Quality Act does not apply.

II.Findings and Declarations

The Commission finds and declares as follows:

1. Existing Conditions and Background

A. Project Location

The proposed project is located on a small fill and sandy beach area on an irregularly shaped strip of mostly vacant land located at 26th Avenue Beach between East Cliff Drive (the first public road) and the Monterey Bay just seaward of Moran Lake and Moran Lake County Park in the unincorporated Live Oak beach area of Santa Cruz County.

1. Santa Cruz County Regional Setting

Santa Cruz County is located on California's central coast and is bordered to the north and south by San Mateo and Monterey Counties (see exhibit A). The County's shoreline includes the northern half of the Monterey Bay and the rugged north coast extending from the City of Santa Cruz to San Mateo County along the Pacific Ocean. The County's coastal zone resources are varied and oftentimes spectacular, including the Santa Cruz Mountains coastal range and its forests and streams; an eclectic collection of shoreline environments ranging from craggy outcrops to vast sandy beaches (in both urban and more rural locations); numerous coastal wetland, lagoon and slough systems; habitats for an amazing variety and number of endangered species; water and shore oriented recreational and commercial pursuits, including world class skimboarding, bodysurfing, and surfing areas; internationally renowned marine research facilities and programs; special coastal communities like Pleasure Point; large State Parks; and

the Monterey Bay itself. The unique grandeur of the region and its national significance was formally recognized in 1992 when the area offshore of the County became part of the Monterey Bay National Marine Sanctuary (MBNMS), the largest of the 12 such federally-protected marine sanctuaries in the nation.

Santa Cruz County's rugged mountain and coastal setting, its generally mild climate, and its well-honed cultural identity has combined to make the area a desirable place to both live and to visit. As a result, the County has seen extensive development and regional growth over the years that the California Coastal Management Program has been in place. In fact, Santa Cruz County's population has more than doubled since 1970 with recent census estimates indicating that the County is home to over one-quarter of a million persons.[1] This level of growth not only increases the regional need for housing, jobs, roads, urban services, infrastructure, and community services, but also the need for park areas, recreational facilities, and visitor-serving amenities. For coastal counties such as Santa Cruz where most of the residents live within a half-hour of the coast, and most significantly closer than that, coastal zone resources are a critical element in helping to meet these needs. Furthermore, with coastal parks and beaches themselves attracting visitors into the region, an even greater pressure is felt at coastal recreational systems and destinations like 26th Avenue Beach and Moran Lake County Park. 26th Avenue Beach is particularly popular because there is a parking lot and restroom/shower facilities immediately across East Cliff Drive from the beach, a rarity in Live Oak (see also below). With the Santa Cruz County shoreline and beaches providing arguably the warmest and most accessible ocean waters in all of Northern California, and with the large population centers of the San Francisco Bay area, San Jose, and the Silicon Valley nearby, this type of resource pressure is particularly evident in coastal Santa Cruz County.

Live Oak is part of a larger area including the Cities of Santa Cruz and Capitola that is home to some of the best recreational beaches in the Monterey Bay area. Not only are north Monterey Bay weather patterns more conducive to beach recreation than the rest of the Monterey Bay area, but north bay beaches are generally the first beaches reached by visitors coming from the north of Santa Cruz. With Highway 17 providing the primary access point from the north (including from the San Francisco Bay Area, San Jose and the Silicon Valley) into the Monterey Bay area, Santa Cruz, Live Oak, and Capitola are the first coastal areas that visitors encounter upon traversing the Santa Cruz Mountains (see exhibit A). As such, the Live Oak beach area is an important coastal access asset for not only Santa Cruz County, but also the entire central and northern California region.

2. Live Oak Beach Area

Live Oak is the name for the unincorporated segment of Santa Cruz County located between the City of Santa Cruz (upcoast) and the City of Capitola (downcoast). The Live Oak coastal area is well known for excellent public access opportunities for beach area residents, other Live Oak residents, other Santa Cruz County residents, and visitors to the area. Walking, biking, skating, viewing, skimboarding, bodysurfing, surfing, fishing, sunbathing, and more are all among the range of recreational activities

[1] Census data from 1970 shows Santa Cruz County with 123,790 persons; California Department of Finance estimates for the 2000 census indicate that over 255,000 persons reside in Santa Cruz County.

possible along the Live Oak shoreline. In addition, Live Oak also provides a number of different coastal environments including sandy beaches, rocky tidal areas, blufftop terraces, and coastal lagoons (such as Moran Lake). Live Oak includes a number of defined neighborhood and special communities within it, including the larger Pleasure Point area, for which this site is located at the entry way of sorts as one travels downcoast towards Capitola. These varied coastal characteristics make the Live Oak shoreline unique in that a relatively small area can provide different recreational users a diverse range of alternatives for enjoying the coast. By not being limited to one large, long beach, or solely an extended stretch of rocky shoreline, the Live Oak shoreline accommodates recreational users in a manner that is typical of a much larger access system.

Primarily residential with some concentrated commercial and industrial areas, Live Oak is a substantially urbanized area with few major undeveloped parcels remaining. Development pressure has been disproportionately intense for this section of Santa Cruz County. Because Live Oak is projected to absorb the majority of the unincorporated growth in Santa Cruz County, development pressure will likely continue to tax Live Oak's public infrastructure (e.g., streets, parks, beaches, etc.) as the remaining vacant parcels are developed and developed residential lots are re-developed with larger homes.[2] Given that the beaches are the largest public facility in Live Oak, this pressure will be particularly evident in the beach area.

3. 26th Avenue/Moran Lake Beach

The project site is located on the main portion[3] of 26th Avenue (also known as Moran Lake) Beach (see exhibits A and B). This beach is an extremely popular recreational beach,[4] and a prime bodysurfing, skimboarding and surfing destination[5] that extends from Corcoran Lagoon upcoast to the outcroppings of Soquel Point (better known as "Pleasure Point") about 200 yards downcoast of the project site. Although this beach has been severely impacted over time by almost continuous piles of rock rip-rap

---

2 Live Oak is currently home to some 20,000 residents. The LCP identifies Live Oak at buildout with a population of approximately 29,850 persons; based on the County's recreational formulas, this buildout population would require 150-180 acres of park acreage. Though Live Oak accounts for less than 1% of Santa Cruz County's total land acreage, this projected park acreage represents nearly 20% of the County's total projected park acreage.

3 The sandy beach area immediately opposite East Cliff Drive from Moran Lake is the largest open area of 26th Avenue Beach because the bluff areas up and downcoast extend seaward from East Cliff Drive and are fronted by rip-rap. It is also the primary access point directly across from the parking lot at Moran Lake County Park.

4 Historic County analyses estimated average daily use of this beach at 848 persons, showing it to be the second highest beach use area in Live Oak after Twin Lakes State Beach located upcoast near the Santa Cruz Harbor (Technical Appendix; Live Oak General Plan; Planning Analysis and EIR, October 1977). Background LCP reports completed in 1980 estimated annual visitor counts for this beach segment at 195,393 (1980 Public Access Working Paper for the County LCP). Given the doubling of the County's population since 1970, and the increase in recreational use associated with that and population increases in surrounding areas, and the development of a parking area, restrooms, showers, and other park amenities just inland at Moran Lake County Park in the time since these surveys, these historic figures likely underestimate the current level of use at this location.

5 Along with Aliso and Tenth Street Beaches in Laguna Beach, and the Wedge in Newport Beach, 26th Avenue/Moran Lake Beach is known as one of the best skimboarding and bodysurfing locations in California. Professional and amateur contests are often held here, and recreational users pack the nearshore area at the project site. It is also home to a well-known surfing break that provides a high energy, if somewhat abrupt, rolling beach break known for its Pipeline-esque (but smaller scale) barrels often delivering surfers right to the sandy shore ("26th Avenue"), as well as the break known as "Little Wind-n-Sea" just downcoast where rolling waves form off of the first outcroppings of Soquel Point (better known as "Pleasure Point").

extending along the backing bluffs, it remains a significant public access and recreation area.[6] Moran Lake County Park is just inland of East Cliff Drive from the project site, and supports beach and ocean use with public parking spaces, restrooms, showers, picnic tables, and other Park amenities. The Park also includes an important Monarch butterfly over-wintering habitat area as well as the Lake itself that have previously been recognized by the Commission as environmentally sensitive habitat areas (ESHAs).

B. Site Characteristics

1. Proposed Development Site

The proposed project is located on an irregularly shaped, +/- 6,131 square foot parcel (APN 028-481-03), and within an oddly configured sandy beach/fill portion of the parcel, that is located between East Cliff Drive and the Monterey Bay at 26th Avenue Beach (see exhibit D for proposed project plans, and exhibit G for annotated site plans).[7] The parcel is bounded immediately downcoast by an existing residence (also owned by the Applicant, on APN 028-481-04) and upcoast by a box culvert connecting Moran Lake to the beach under East Cliff Drive. The portion of the site on which development is proposed is currently covered by a mixture of broken concrete slab nearest to East Cliff Drive (extending onto this site from the downcoast residence) and, closer to the Bay, some scattered fill material and rip-rap rocks atop the sandy beach (see photos in exhibit B). The eastbound lane of East Cliff Drive is located on the northerly portion of the property (within a County-owned easement),[8] and an existing deteriorated pole and metal-cable fence runs along East Cliff Drive. An abandoned drainage culvert under East Cliff Drive is located on the parcel. The parcel also extends to the south and is occupied in this area by rip-rap protecting the Applicant's adjacent residence, an existing deck connected to the adjacent residence, a concrete beach access stairway (extending from the deck), a rope and pole fence (at the rip-rap edge demarking the inland yard) and landscaping. In other words, the Applicant's adjacent residential development occupies portions of the subject parcel. The subject parcel was temporarily occupied by a two-story single-family residence in the 1970s for about 10 years (constructed just prior to the coastal permitting requirements of Proposition 20 and the Coastal Act), but

---

6 The beach here is in most cases less than 50 feet wide in summer and completely disappears during parts of the winter. Rip-rap revetments armor the backshore and encroach onto areas that otherwise would provide sandy beach access. The Commission's 1995 Monterey Bay ReCAP project, or Regional Cumulative Assessment Project, estimated that roughly 1¼ acres of sandy beach at 26th Avenue Beach was covered by rock revetments (based on a conservative footprint width estimate of 20 feet of sand beach coverage for such structures). However, the ReCAP revetment footprint estimate was a general estimate for revetment size over the entire ReCAP area. Because most of the revetments along this portion of the Santa Cruz coast have a footprint that is bigger than the assumed 20-foot width, the actual area of revetment coverage may actually be higher than that estimated in ReCAP. In any case, because such armoring fixes the bluff location and prevents beach replenishment from eroding bluffs, and in light of sea level rise and continuing shoreline erosion, it is expected that the usable beach areas here will continue to narrow over time (see also "Geologic Conditions and Hazards" section that follows).

7 The Applicant has calculated that the subject parcel is 6,131 square feet. However, due to the ambulatory nature of the shoreward boundary, the actual size of the parcel can change over time, and could be somewhat less than that calculated. The deed for the parcel explicitly excepts from it any area below mean high tide. In any case, 6,131 square feet is used as the gross parcel size in this report, subject to this caveat.

8 The County-owned easement for East Cliff Drive occupies about 1,000 square feet of the 6,131 square foot parcel on the inland side, with about two-thirds of this area currently occupied by East Cliff Drive travel lanes.

that residence was washed into the ocean by storm waves in 1983 (see photos in first 3 pages of exhibit H). See exhibits D and G for a graphic depiction of the above-detailed characteristics in site plan view, and see exhibit B for project area photos.

Some of the development on the project site was constructed without the necessary coastal permits in violation of the Coastal Act's permitting requirements. This includes most of the rip-rap (and all of the rip-rap where the residential structure and associated driveway are proposed – see page 2 of exhibit G), and the pole and metal-cable fence along East Cliff Drive. As a result, although the rip-rap and fence are shown in site plans and exhibits, and are acknowledged because they are physically present, these structures are not a part of the baseline condition against which this proposed project is evaluated for Coastal Act consistency. Commission enforcement staff are continuing to work with the Applicant to resolve these issues and bring the site into coastal permit conformance.

2. Property Characteristics

The subject site is located at the mouth of Moran Lake, and both it and the Applicant's adjacent residence site were historically part of the mouth of the lagoon estuary within the Rancho Arroyo del Rodeo.[9] Typically, these type of lagoon estuary lands became State owned lands and/or lands subject to State-owned easement when California became a State in 1850. However, "rancho" lands were lands that had been granted to individuals by Mexico or Spain before California became a state, and were treated differently than non-rancho lands. As part of the Treaty of Guadalupe Hidalgo ending the war with Mexico in 1848, the United States agreed to "patent" or officially give these rancho lands to the individuals who were owners at the time of the treaty.[10] After a certain process took place, some of the lands were patented and officially owned by the grantees, whether they contained public trust resources or not.[11] This notion of private ownership of some public trust lands has been upheld by the United States Supreme Court for certain types of ranchos.[12] The California State Lands Commission has concluded that it does not have sufficient information to determine whether any of this site includes

---

9 The Rancho Arroyo del Rodeo included all that land between Rodeo Creek upcoast (which outlets at Corcoran Lagoon) and Soquel Creek (which outlets in Capitola) downcoast extending roughly five miles inland into the Santa Cruz Mountains and including much of present day Capitola and Soquel. The State Lands Commission plotted the survey of the rancho, including the then configuration of Moran Lake within it, on a current base map. This plot shows that the lagoon edge (perpendicular to the shoreline) historically ran along what is now the southeastern parcel boundary of the Applicant's adjacent parcel (APN 028-481-04), and that both of the parcels are located in what was then the lagoon. This is also evident from the site's geologic cross section, and the topography of the site and surrounding area inland that indicate the properties were once contained within the lagoon mouth that was at one time much wider than it is today (i.e., the lagoon mouth width has been reduced due to fill).

10 In this case, the Rancho Arroyo del Rodeo was a Mexican land grant in 1834 to Francisco Rodriquez. Rodriquez sold the rancho to Hames and Daubenbiss in 1848.

11 In this case, the grant was confirmed by the U.S. Land Commission in 1855.

12 See, for example, the 1984 Summa Corporation case involving Ballona wetlands in southern California (*Summa Corp. v. California Ex Rel. Lands Comm'n*, 466 U.S. 198 (1984)). In that case, the U.S. Supreme Court reversed the decision of the State Supreme Court and held that if the State of California had not asserted a public trust interest during the patent process for particular lands, the State could not assert that public trust interest afterwards.

State Lands, and asserts no claim at this time (without prejudice to any future claim).[13]

In more recent history, the Applicant's property was occupied in part by East Cliff Drive in a previous configuration, is now partly occupied by East Cliff Drive in its current configuration, and was partly filled as a direct result of East Cliff Drive construction and placement. Through a series of court judgments, and ultimately a subdivision in 1971, the Applicant's two underlying parcels were created in their current configuration, subject to various property restrictions and easements. These parcels are both encumbered by easements owned by the County: the aforementioned East Cliff Drive roadway easement (occupying 1,053 square feet, or 17%, of the subject parcel) as well as a County drainage easement running along the original right-of-way of East Cliff Drive located on the western portion of the site (occupying 4,096 square feet, or 67%, of the subject parcel). The parcels are also encumbered in specific locations by restrictions prohibiting structural development (occupying 1,776 square feet, or 29%, of the subject parcel, almost entirely within the area of the drainage easement). These latter restrictions were established to protect residential views of the beach and ocean. See page 3 of exhibit G for a site plan depiction of the easements and restrictions on the property. As seen on the exhibit, only 873 square feet of the subject parcel is not encumbered by these restrictions and easements (this area is roughly the location of the proposed driveway).

In terms of the area restricted against structural development on APN 028-481-03, there currently exists rip-rap and decking (connected to the Applicant's existing residence on APN 028-481-04) that are inconsistent with this property restriction. A small portion of the proposed residence would also be located within this "no build" area. That said, the two parcels are under common ownership and the Applicant could unilaterally delete and/or modify this "no build" area property restriction to allow such development (subject to all necessary permit processes, of course). Thus, this property restriction would not affect the proposed project.

In terms of the County's drainage easement, this area includes within it most of the restricted development area discussed above and thus includes the rip-rap and decking in this area within it, as well as other scattered rip-rap extending to the north. All of the proposed residential structure, other than a small area of overhanging deck and roof, would be constructed within the County's drainage easement (see exhibit G). The County indicates that project would have to incorporate appropriate drainage measures and/or be designed in a manner that would not interfere with its drainage easement. This project would need to address the County's drainage concerns, but the easement would not otherwise preclude the proposed development.

In terms of the County's East Cliff Drive easement, this area is the 17½-foot wide strip of land running along the northeastern portion of both parcels and provides "for all the purposes of a roadway and not otherwise" within it.[14] Neither the Applicant's existing structures (e.g., the metal-cable rope fence) nor the proposed structures (i.e., residential driveway, large rocks, plants, and trees; see also project

[13] In other words, it is not clear whether a formal evaluation of the site would conclusively show whether the site is public trust land, but State Lands has not ruled out that possibility. See letter dated October 8, 2002 (see exhibit I).

[14] The County's easement dates to a 1964 court decision involving what is now a portion of the Applicant's two parcels.

description below) in the County's easement are legally allowed without an encroachment permit.[15] An encroachment permit decision is based on the site context, and generally follows the coastal permit (or other) discretionary permit decision allowing development in the first place. If such structures in the public easement do not compromise public use of it (as determined in the required approval process), then an encroachment permit may be granted. Thus, in this case, the County's easement does not outright preclude the proposed development within it, but any approved development must be analyzed within the site roadway use and need context (see "Public Access and Recreation" section that follows).

Finally, there is the question of whether an implied dedication or prescriptive right of access has been established on part or all of the subject property.[16] The Commission's Public Access Program is currently investigating such implied dedication/prescriptive rights for APN 028-481-03, and has received over 50 affidavits describing public recreational use on the property going back to the early 1960s (see also "Public Access and Recreation" section that follows); much of this use has apparently been on a daily basis. The evidence thus far suggests that at least some of the public has historically used much of this site for varied recreational use for decades, and continues to substantially do so at present. That said, only a court of law can establish an implied dedication/prescriptive right, and there is not one established at this site.[17] Thus, although it is relevant in terms of Coastal Act consistency analysis, the property is not formally encumbered by an implied dedication or prescriptive right of access.

2. Project Description

The Applicant proposes to construct a residential structure in the area occupied by the scattered fill material, scattered rip-rap rocks, and sandy beach along the seaward parcel boundary (see exhibit D for proposed project plans). The residential structure would include a massive foundation and support structure consisting of four 54" diameter reinforced concrete caissons poured and formed in holes drilled down 44 feet and extending roughly 17 feet into bedrock (where "bedrock" is the Purisima Formation sandstone that underlies the beach sand, lagoon, and alluvium deposits at the site). The four caissons would be tied together by large concrete beams, themselves roughly 5 feet wide and 3 feet tall, defining the perimeter of the bottom story and extending up to elevation +14 NGVD[18] (roughly equivalent to the

---

15 There is not currently an encroachment permit allowing the existing structures.

16 California law provides that, under certain conditions, public access across private property may result in the establishment of a permanent public easement. This easement is called a public prescriptive right of access (or sometimes an "implied dedication").

17 The Coastal Commission's Public Access Program investigates areas where the potential for prescriptive rights exists. The goal of a prescriptive rights investigation is to gather enough information about the subject property to accurately detail the property's history and use status. The initiation of a prescriptive rights investigation is not a judgment that a "prescriptive right" exists or probably exists; such rights can only be established or extinguished by the courts. Rather, the outcome of the investigation will determine whether there is a sound factual basis for making a claim of prescriptive rights. As of the date of this report, the prescriptive rights investigation is continuing, but the Commission has not yet considered whether to pursue such litigation at this location.

18 NGVD, National Geodetic Vertical Datum, is not to be confused with Mean Sea Level (MSL). MSL is the local mean sea level whereas NGVD is a fixed datum adopted as a standard reference for heights (where MSL was held fixed as observed at 26 stations in the U.S. and Canada). NGVD for the Monterey Bay area was adjusted in 1961 and revised in 1986. For the Monterey Bay area, MSL is +0.03 feet NGVD, or about a third of an inch above NGVD. NGVD is used in this report to describe elevations.

elevation of East Cliff Drive inland of the structure). Eight 2-foot diameter concrete piers would extend from the perimeter beams through to an upper-story floor concrete slab (itself 2 feet thick in a waffle pattern). From the upper story concrete slab, six (of the eight) 2-foot diameter concrete piers would be exposed in the living area and extend through to the flat roof. See page 3 of exhibit D for an elevation view of the structure.

The residential structure would extend 28 feet above the top of the concrete perimeter beams (up to approximately +42 NGVD) and it would be topped with a flat roof. The structure would thus extend from –33 NGVD (at the bottom of the caissons) up to +42 (at the top of the roof); a total structural distance of 75 feet (see elevation on page 3 of exhibit D). It would include two useable stories, a garage/storage lower story (756 interior square feet) and a habitable living area upper story (936 interior square feet and 487 square feet of deck area – a total of 1423 square feet of useable space in the upper floor), with a non-functional middle story that is made up of a 7-foot tall "void" between the garage ceiling and the second story concrete slab (756 interior square feet). Thus the appearance would be of an elongated 2-story structure, or more fittingly a 3-story structure.

The lowest story of the residential structure would be created by laying concrete planks or beams across the concrete perimeter beam system to form a garage floor.[19] These planks or beams would not be structurally attached or fastened, rather they would be simply placed "loose" atop the beams. This lower garage story would have two openings on the inland side (roughly 9 feet wide and 7 feet tall each) located between the super-structure piers to allow vehicle access, and would include a 4-foot tall by 24-foot wide opening along the seaward side approximately 3 feet above the concrete perimeter beams (at elevation +17 NGVD). In other words, the vehicular portion of the garage would be partly open at all times (like a carport of sorts). About a third of the garage story would be enclosed storage space framed by an interior partition and door. The lowest 3 feet of the perimeter garage wall would be made out of concrete designed to collapse if hit by storm flooding.[20]

The upper story would include a partially covered (by the roof) cantilevered and angled deck (487 square feet) ringed by a solid 4½-foot tall barrier wall. An exterior stairway, likewise edged by a 4½-foot tall barrier wall, would provide the only access to the upper story deck, from which access to the living space "front door" on the upper story would be made.[21] The exterior sheathing would be plywood

---

19 The project plans do not provide significant detail on the proposed concrete planks to be used for the floor. The Applicant's engineer indicates that the precise dimensions of these planks would be determined at a later date after the project was approved. The dimensions would be based upon the types of flood forces expected to hit the beams, and the need for them to come loose by design in response to these specific forces. Although called "planks" in the plans, these concrete structures could be 8 inches thick or so (according to the project engineer), and might more aptly be called beams.

20 The project plans also do not provide significant detail on the 3-foot concrete wall. The Applicant's engineer indicates the wall would be made out of hollow concrete blocks that would be stacked loose (and not reinforced with concrete, rebar, or grout).

21 The project plans also do not provide significant detail on the stairway. The Applicant's engineer indicates that the stairway would be made to withstand the design storm, but that its specific parameters would be determined at a later date after the project was approved. The project engineer indicates that the stability of the stairway would likely be accomplished by tying it into the pier system (at its base and through to the upper level), using open riser steps and railings, and by constructing it in concrete. Note that the project plans do not provide this level of detail and are only illustrative of where the stairway would be sited in this regard. For example, the project engineer's indicates that it is likely that the stairway would not include a barrier wall although this is shown in the proposed project plans (exhibit D) because the railing would be open to allow flood waters to pass more easily through.

with narrow wood battens (designed to match the Applicant's existing adjacent residence) painted beige with white trim. A bank of windows would extend from the floor to the ceiling across the beach elevation and across the south (downcoast) elevation, with additional windows on the north and east elevations. The flat roof would be tar and gravel in a gray color. An upper story fireplace would be located along the seaward elevation with its concrete and cantilevered chimney extending 3 feet above the flat rooftop. See exhibit D for proposed project plans and the proposed materials palette. See also the Applicant's photo-simulations in exhibit E and the staking and netting erected to approximate the residential structure proposed in exhibit F.

The project also includes a proposed 1,022 square foot hammerhead driveway (see site plan in exhibit D). The Applicant indicates that the driveway may need to include a bridge connecting the garage to an inland location nearer to East Cliff Drive, depending on the actual elevation in this area.[22] Presumably, similar concrete planks/beams or other structure would extend from the bridge to the stairway to allow access into the upper floors (because there is a gap between the base of the stairs and the driveway, and a similar elevation issue). Trees and shrubs are proposed to be planted in the area surrounding the driveway/bridge, and similar landscaping and boulders (3 and 4 foot in diameter) are proposed to be installed between the driveway and the current East Cliff Drive pavement (i.e., in the County's roadway easement).

The residence would be connected to public water, sewer and other utilities in East Cliff Drive. The proposed project plans do not provide any detail on how the utility connections would be made. At a site like this where the utilities would be subject to especially harsh conditions, their design is critical. The Applicant's engineer indicates that they would be designed to withstand the design storm, but that the specific parameters would be determined at a later date after the project was approved. The Applicant's engineer indicates that it is likely that the utilities would be formed within the concrete piers from the upper story down to the scour level at the site (-2 NGVD), and then encased in concrete (possibly placed within a concrete joint utility pipe) from the pier to connect laterally to the utilities in East Cliff Drive. The utility connection point at East Cliff Drive would then include some form of engineered backflow prevention devices and/or other in-line precautionary measures to protect against shearing the public water and/or sanitary sewer lines in a storm event, although the specific design has not yet been identified. Given the low elevation of the lateral in relation to utilities in East Cliff Drive, the sewer line would likely need to include some form of individual pump system to function properly; it is not clear where or how this system would be placed or operated.[23]

---

[22] The elevation in this area appears to have dropped since the time the site was surveyed over a year and a half ago, and it will drop more when the unpermitted rip-rap in this area is removed. It appears that there is not adequate elevation at the site to allow a paved driveway to be placed atop the existing contour as a means of to connecting the garage to East Cliff Drive as shown in the proposed site plan. The Applicant's engineer indicates that the specific driveway parameters would be determined at a later date after the project was approved, and based on a survey at that time. If the elevation was high enough to support a paved access, the driveway would be paved. If the elevation was not high enough for pavement, concrete planks or beams would be placed in such a way as to create a bridge from the garage to an inland "abutment" as necessary. As with the garage floor planks/beams, these planks/beams would not be fastened or attached in any way (to allow them to be displaced in a storm event), but rather laid across the void.

[23] Again, the Applicant's engineer indicates that these types of details would be refined at a later date. The sewer line pump system would likely require some sort of back-up system as well. If the storm is large enough to threaten the sewer line, it could also threaten

Except for the concrete caisson/pier superstructure, the stairway access to the top floor, and the utility lines, all other portions of the proposed development below the habitable area (including garage walls, concrete planks/beams, the driveway/bridge, and anything else below the upper story slab) would be constructed so that they would collapse and be carried away in a storm/flood event.[24]

Finally, as described above, the exact parameters of the proposed development in some ways have not been precisely determined. The Applicant has changed the details of the project several times from the time the application was submitted up to the time of this report. These changes have been partially in response to information requests that resulted in the Applicant changing the design (including increasing the elevation of the upper floor, adding caissons, replacing the slab at the garage elevation with the now proposed horizontal concrete beam system, etc.) or that resulted in additional detail being provided where none had been provided before (e.g., stairway parameters, utility connections, concrete plank dimensions, etc.). These changes have also been due to the fact that the site is constantly changing due to ongoing active coastal processes (e.g., issues having to do with site elevations and how the lower floor would be accessed from East Cliff Drive). Some project details remain unknown because more detailed engineering work would be required, and thus additional changes would be likely if the project were to be approved (e.g., utility connections, driveway/bridge access, etc.). In any event, the proposed project plans (as supplemented by the additional information provided by the Applicant to clarify portions of them) are adequate to allow analysis of the project. If a project were approved, additional more detailed engineering work would be required, and some portions of the project may change in response to that additional work. However, the changes would not be expected to substantially change the basic development framework proposed, and thus would not be expected to substantially change the basic Coastal Act conformance questions raised by the proposed project.

3. Standard of Review

The Applicant originally applied to Santa Cruz County for a similar residential project (Santa Cruz County application number 00-0189).[25] However, during the course of that review, the County questioned their coastal permit jurisdiction and forwarded a request to the Coastal Commission to determine if the site was in the County's coastal permit jurisdiction or in that of the Commission. In December 2001, Commission mapping staff determined that the project was located in the Commission's retained jurisdiction, and not the County's, and both the County and Applicant were immediately advised of this determination.[26] The County subsequently approved a staff-level riparian exception to allow a building footprint within 100 feet of Moran Lake, and indicated that there were no

---

the electric line. The pump would need an emergency back-up, or some automatic shut-off at the main line so that sewage from the house would be contained in the house's sewer line, but sewage from the main line would not back-up into the house line.

24 See also "Geologic Conditions and Hazards" section that follows.

25 Commission staff provided comment on the County application in early 2000, upon the request of Santa Cruz County. See comment letter in exhibit J.

26 Note that both APNs 028-481-03 and 028-481-04 were determined to be in the Commission's retained jurisdiction.

additional approvals from the County necessary for the project.[27] The Applicant subsequently applied to the Commission for a coastal permit.[28]

Thus, the standard of review for the proposed coastal development permit decision is the Coastal Act. The County's certified LCP can provide non-binding guidance to inform the coastal permit decision, but it cannot be used explicitly as a basis for approval or denial of the coastal permit for the project.[29] The findings that follow identify applicable Coastal Act policies, and also identify select LCP policies as relevant.

4. Coastal Development Permit Determination

A. Geologic Conditions and Hazards

1. Applicable Policies

Coastal Act Section 30235 addresses development (such as shoreline protective devices) that alters natural shoreline processes. Section 30235 states:

> ***Section 30235.*** *Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.*

Coastal Act Section 30253 addresses the need to ensure long-term stability and structural integrity, minimize risk, and avoid landform-altering devices. Section 30253 provides, in applicable part:

---

[27] See County review documents in exhibit K. Note that in cases where the Commission retains coastal permit jurisdiction, it has been the County's position that only ministerial permits from the County are required (such as building and grading permits) unless variances from County requirements are required for the project. According to the County, if a project requires a variance, then it requires discretionary approval.

[28] Note that during the course of Commission staff review of the application, it became apparent that the plans that the County had reviewed in 00-0189 differed from those submitted to the Commission. Commission staff identified multiple variances (in addition to the riparian exception variance) to County code requirements that would be necessary to allow the project to proceed. By this time, the Commission application had already been filed; partly relying on the submitted assessment from the County that indicated that no further approvals were necessary. The County was made aware of the difference in plans, and the apparent variances to County code requirements associated with them, and was subsequently asked whether further County approval would be necessary. As of the date of this staff report, the County has not definitively indicated whether additional County approval would be required. In any case, this application has been brought before the Commission for action irrespective of its local approval status because the Coastal Commission application was already filed, because PSA deadlines were not stayed by the lack of clarity on local approvals, and because of the significant coastal resource issues engendered by this proposed project. In this sense, and to the extent additional County discretionary approvals would be necessary, the Coastal Commission Executive Director waives them for purposes of the application to the Commission (pursuant to California Code of Regulations Title 14, Section 13053(a)(2)). Such waiver does not excuse the Applicant from obtaining any non-coastal permit approvals the County subsequently deems necessary.

[29] The County's General Plan and Zoning Code (that include all of the LCP as well as some non-LCP policies and sections) is still the relevant standard of review for any non-coastal permit County approvals, to the extent that they might be necessary.

Section 30253. *New development shall:*

(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Coastal Act Section 30235 acknowledges that certain types of development (such as seawalls, revetments, retaining walls, groins and other such structural or "hard" methods designed to forestall erosion) alter natural shoreline processes. Accordingly, with the exception of new coastal-dependent uses, Section 30235 limits such construction to that that is "required to protect existing structures or public beaches in danger from erosion." The Coastal Act provides this limitation because shoreline protection structures and similar development can have a variety of negative impacts on coastal resources including adverse effects on sand supply, public access, coastal views, natural landforms, and overall shoreline beach dynamics on and off site.

Coastal Act Section 30253 requires that risks be minimized, long-term stability and structural integrity be provided, and that new development be sited, designed, and built to allow for natural shoreline processes to occur without shoreline altering protective devices. Coastal development permittees for new shorefront development thus are essentially making a commitment to the public (through the approved action of the Commission) that, in return for building their project, the public will not lose public beach access, sand supply, ESHA, visual resources, and natural landforms, and that the public will not be exposed to hazardous structures or be held responsible for any future stability problems that may affect the development. Coastal Act Section 30253 requires that the proposed project assure structural stability without protective devices.

2. LCP Policies

The LCP follows the Coastal Act hazard policies, and provides some additional specific guidance. For example, the LCP requires that a coastal bluff and beach building site be stable for a minimum of 100 years in its pre-development application condition, and that any development on it be set back an adequate distance to provide stability for 100 years. In both cases, the 100 years of stability must be established through the use of appropriate setbacks and siting, and without reliance on engineering measures "such as shoreline protection structures, retaining walls, or deep piers" (IP Section 16.10.070(h)). The LCP also prohibits utilities in coastal hazard areas "unless they are necessary to serve existing residences" (LUP Policy 6.2.18), and allows shoreline protection structures only "to protect existing structures from a significant threat" (LUP Policy 6.2.16 and IP Section 16.10.070(h)(3)) (emphasis added). In addition, and for storm flood hazard specifically, the LCP requires that the lowest floor (and all structural portions of it) be elevated at least one foot above the 100-year flood level (IP Sections 16.10.070(f)(3)(vi) and 16.10.070(h)(5)(iii)). In other words, the LCP has a two part 100-year stability requirement: first, there must be a portion of the site in question that itself will be stable for 100 years in a pre-development (i.e., no project) scenario, without reliance on structural development to make it so; and second, ostensibly if the first test is met, any development then introduced into the site

must also be stable for 100 years without reliance on engineering measures. Furthermore, while it may be possible to engineer for flooding hazards by using piers to elevate new development above the 100-year flood elevation, the LCP does not allow piers to be used to establish long-term site stability.

On the whole, these LCP policies recognize that development is not appropriate in coastal hazard areas for which 100 years (minimum) of site and structural stability cannot be guaranteed (without relying on engineering measures) and allows shoreline protection in only very specific and limited circumstances for already existing development.

3. Reports Submitted

The Applicant has submitted the following geologic and geotechnical engineering reports for the site:

- *Geologic Report Lands of Williams* by Rogers E. Johnson & Associates, dated February 29, 2000 (RJA 2000a);
- *Supplemental Letter Report Lands of Williams* letter-report by Rogers E. Johnson & Associates, dated July 6, 2000 (RJA 2000b);
- *Response to California Coastal Commission Inquiry of 25 September 2003 E.J. Williams Property* letter-report by Rogers E. Johnson & Associates, dated September 30, 2003 (RJA 2003);
- *Geotechnical and Coastal Engineering Investigation for Beach Parcel Building Envelope* by Haro, Kasunich & Associates Inc., dated March 2000 (HKA 2000a);
- *Additional Information,* letter-report by Haro, Kasunich & Associates Inc., dated July 5, 2000 (HKA 2000b);
- *Response to Coastal Commission Letter Dated 1 May 2003 – Item 1,* letter-report by Haro, Kasunich & Associates Inc., dated May 21, 2003 (HKA 2003); and
- *Geotechnical and Coastal Engineering Review of Architectural Layout,* letter-report by Haro, Kasunich & Associates Inc., dated January 15, 2004 (HKA 2004);

There is a base geologic report (RJA 2000a) that has been supplemented twice (RJA 2000b and RJA 2003), and there is a base geotechnical engineering report (HKA 2000a) that has been supplemented three times (HKA 2000b, HKA 2003, and HKA 2004). In addition, HKA has provided additional engineering detail in direct communications with Commission staff. The geologic description of the site that follows derives primarily from RJA 2000a and 2000b, and HKA 2000a reports, including the subsurface boring analysis.

4. Site Geologic Characteristics

As detailed earlier, the site is located where the mouth of Moran Lake and the unnamed creek feeding it historically met the ocean (before the East Cliff Drive fill essentially severed this natural connection).

Because of this, the site's geology is not typical of the type of back-beach bluffs that are common to the Live Oak beach area, but is more aptly characterized as dune/lagoon geology.[30] In fact, photographic evidence indicates that a dune field was present in this location up until at least the late 1960s.[31] The current cross section through the site varies considerably because the site slopes away from East Cliff Drive towards the Monterey Bay, but its geologic characteristics can be detailed. The ancient bedrock at the site is the Purisima Formation, and it is located approximately 20-25 feet below the surface (about -16 NGVD). A 7-foot layer of alluvium (fine sand and gravel) is atop the Purisima Formation, and itself is covered by a 7-foot layer of very soft lagoon deposits (primarily peat and organic silt). The surface of these lagoon deposits show evidence of erosion by past wave action. The lagoon deposits are currently covered by a layer of beach sand, about 7 to 12 feet thick, depending on the season. Scattered fill material, a mixture of sand and concrete, rip-rap, and rubble, roughly rounds out the cross section. Thus, the geologic profile sequence shows the site to be roughly 25 feet of fill, sand, lagoonal deposits, and alluvium resting atop the harder Purisima Formation bedrock, where the depth of the uppermost sandy beach layer is different across the site (and continually changing) (see exhibit C for a geologic cross-section of the site and immediately surrounding area).

The elevation of the area where the residence is proposed is uneven and varies from +5 NGVD (winter beach profile) to +10 NGVD (summer beach profile). The highest portion of the parcel is at roughly +15 NGVD at the abandoned inland concrete pad that slopes at approximately the same elevation as East Cliff Drive).[32] As described earlier, the proposed house and driveway location is also occupied by scattered rip-rap at varying elevations, but this rip-rap is not considered a baseline condition for the site because it is unpermitted (as detailed in previous findings). In any event, such rip-rap in this area is elevated above the sand somewhat, up to about +14 NGVD in places (i.e., at individual rock protrusions, not uniformly) as recently as 2003.[33] Recent site photos show that most of the remaining rip-rap, and the area of the footprint of the proposed house, is below this elevation (see 2004 photos in exhibits B and H).

5. Coastal Processes Active At Site

The site is located on the beach immediately adjacent to the Monterey Bay and is frequently inundated by ocean waves and tides, even during relatively mild weather conditions. During more significant events, the entire site becomes inundated with ocean waters, and sometimes the waves and storm surge wash over the site as well as over inland East Cliff Drive.[34] See photos of various storm surge and flooding events in relation to the building site in exhibit H.

---

30 This is also corroborated by the geologic characteristics of the surrounding area. For example, HKA indicates that immediately up and downcoast of the subject site, the Purisima elevation is 26 feet higher in elevation than at this site (HKA 2000a). The "bowl" or canyon effect where a much shallower Purisima elevation is surrounded by higher Purisima elevations is common at sites such as this that are located where rivers and lagoons historically (and sometimes currently) outlet to the sea.

31 RJA 2000b. Based on RJA's analysis of 1931 through 1997 aerial photographs.

32 RJA 2000a and 2000b.

33 RJA 2000a and 2000b, and HKA 2003.

34 Note that the site is mapped within the flood plain by the County (on the LCP's Flood and Seismic Hazards) and FEMA.

According to RJA (RJA 2000a), the frequency of major storm events in the Monterey Bay has been documented to be roughly two events every three years.[35] For the subject site location on the northern portion of the Bay, the most damaging of these storms have been those arriving from the west or southwest. Unlike storm waves arriving from the northwest which undergo refraction (and corresponding loss of energy) entering the Bay, storms from the southwest pass primarily over deep water on their way to the shoreline and lose little energy. At least 85 percent of storms causing Monterey Bay damage have approached from the southwest, and the site has seen such southwesterly storms every five years or so on average. In other words, the site has been hit by a major storm every two to three years, with significantly damaging storms occurring every five years or so.

Erosion at the site has been slowed to a degree by the rip-rap placed on the sand over the years. In the absence of the rip-rap, it has been estimated that the site would erode at an average annual rate of 1.5 feet per year.[36] The estimated rate is consistent with that expected in the subsurface Purisima Formation, but the overlying poorly consolidated deposits, which extend to a depth of approximately -16 feet NGVD, would likely erode much faster, especially during major storms.[37] RJA estimates that up to 40 feet of retreat could occur at this site in one sustained storm event, and that the site could be stripped down to the lagoonal deposits (i.e., the historic beach scour platform at about elevation -2 NGVD) in a worst case scenario.[38] HKA concurs on this point indicating that a severe coastal storm event could scour the site down to this elevation,[39] eliminating a wedge of sandy beach and other materials topping the lagoonal deposits (about 10 to 15 feet tall, depending on the season and amount of sand deposition at the time) and inundating this area. The Commission's staff geologist has reviewed the reports, visited the site, and concurs in these assessments.

During a severe storm, such as a 100-year storm event,[40] HKA estimates that storm surge could go as high as +30 NGVD at this site; or approximately 15 feet above the current elevation of East Cliff Drive.[41] Lesser events would be expected to have lower elevation wave run-up. However, even moderate storm events currently wash the site (see also storm photos in exhibit H), and the frequency and severity of storms is expected to increase over time at this site. It is generally understood and

---

35 Where major storm events were identified by RJA as those storms including "either high seas, strong winds, and/or damage to at least some portion of the Monterey Bay region."

36 RJA 2003.

37 Note that average annual erosion rates in the Live Oak beach area for sites that include a more typical 'bluff above the beach' geologic cross-section (i.e., where the Purisima Formation is exposed to marine erosion, and is capped by marine terrace deposits) have been estimated to be about 1-foot per year on average.

38 RJA 2003 and HKA 2000a.

39 HKA 2000a.

40 By definition, a 100-year storm is one that is expected to occur once in 100 years, statistically. Another way of putting it is there is a 1% chance that such a storm would hit in any given year. Given the stochastic randomness of storms, a storm of that magnitude may occur more or less frequently than that, but on average it should occur once in 100 years. These kind of "100-year" estimates are based on historic storm data, and their reliability is directly proportional to the robustness of the record of past events. These estimates are also based on the assumption that the frequency and severity of storms in the past will hold true for storms in the future. This is not necessarily the case for coastal California (see also below).

41 The 1982-83 El Niño event in Santa Cruz is often referred to as an example of a 100 year event. It was during a 1982-83 storm that the one previous residence at this location was washed into the ocean (see photos on pages 1 through 3 of exhibit H).

accepted that sea-level is slowly rising. In the Monterey Bay area, the trend for sea level rise for the past 25 years has been an increase resulting in an historic rate of nearly 1 foot per 100 years.[42] An upper bound estimate for future sea level rise is that it may rise by an additional 3 feet over the next 100 years.[43] Because a rise in sea level will intensify coastal erosion conditions (moving the intensity of ocean storms inland because shallow water is encountered by such storms closer inland than today),[44] more storms would be expected to flood this site than in the past, and maximum storm surge may be even higher than the +30 NGVD estimated.[45] A severe "100-year" storm may bring storm surge that reaches even higher than 15 feet over this site and East Cliff Drive. In addition, the frequency of damaging storms (i.e. storms that can damage the site) would be expected to increase from the historical averages (where the historical average has been estimated as one major storm every two to three years, and significantly damaging one every five years; as discussed above), so that more storms, and more intense storms, would be expected to flood the site more often than has occurred in the past. Thus, what are now considered to be 5-year storm events (characterized by RJA as "significantly damaging storms") could happen more frequently than once every 5 years, 10-year storms more frequently than once every ten years, and so on including what is now considered a 100-year storm could happen more frequently than once every 100 years. While there is no way of predicting when these storms may occur in the future, it is expected that more intense and more frequent storms will occur at this site in the future as compared to the historic record.

---

42 NOAA, National Ocean Service.

43 There is a growing body of evidence that there has been a slight increase in global temperature and that an acceleration in the rate of sea level can be expected to accompany this increase in temperature. According to the *Third Assessment Report - Climate Change 2001*, by the International Panel on Climate Change (IPCC) global sea level is predicted to rise by 0.09 to 0.88 meters (0.3 to 2.88 feet) from the 1990 level by 2100, with significant regional variability. Monterey Bay was not included in the estimates of sea level rise through the year 2100. The closest tidal stations with an adequate record to use for a 100-year projection were San Francisco and Santa Monica. Both those locations could, by the year 2100, have a rise in sea level approaching 3 feet, with a 10% probability that it would be higher than that, based on estimates of historic and future sea level change provided by the U.S. Environmental Protection Agency in Titus and Narayanan (1995) "The Probability of Sea Level Rise" (EPA 230-R-95-008). In the Monterey Bay area, the trend for sea level rise for the past 25 years has been an increase resulting in an historic rate of nearly 1 foot per 100 years (NOAA, National Ocean Service), significantly higher than the average historic change recorded at either San Francisco or Santa Monica. This deviation in historic trends between Monterey Bay and both San Francisco and Santa Monica is very likely due to the short duration of the tidal record at Monterey; however, it can also suggest that the localized rise in sea level in Monterey Bay may be higher than what was experienced at either San Francisco or at Santa Monica. Thus the future 100 year-change in mean sea level for Monterey Bay may be higher than the estimated 2.7 feet (for San Francisco) or the estimated 2.85 feet (for Santa Monica), for both of which there is a 10% probability of being exceeded.

44 With global warming and sea level rise, increased relative wave heights and wave energy are expected. Along much of the California coast, the bottom depth controls the nearshore wave heights, with bigger waves occurring in deeper water. Since wave energy increases with the square of the wave height, a small increase in water depth and wave height can cause a significant increase in wave energy and wave damage. So, combined with the physical increase in water elevation, a small rise in sea level can expose previously protected back shore development to both inundation and wave attack, and those areas that are already exposed to wave attack will be exposed to more frequent wave attack with higher wave forces. Structures that are adequate for current storm conditions may not provide as much protection in the future.

A second concern with global warming and sea level rise is that the climatic changes could cause changes to the storm patterns and wave climate for the entire coast. As water elevations change, the transformation of waves from deep water will be altered and points of energy convergence and divergence could shift. The new locations of energy convergence would become the new erosion "hot spots" while the divergence points may experience accretion or stability. It is highly likely that portions of the coast will experience more frequent storms and the historic "100-year storm" may occur more often.

45 Note that HKA's maximum wave-run-up evaluation is based on an estimated 1-foot rise in sea-level over the next 100 years.

In terms of seismicity, RJA indicates that "the site is located in an area of high seismic activity and will be subject to strong seismic shaking in the future." Given the relatively high water table and the elevation of the sand and silt strata underlying the site, RJA concludes that liquefaction due to seismic shaking could cause the sediments at the site to liquefy and laterally spread towards the ocean.[46] The Commission's staff geologist concurs in this assessment.

In sum, the site is extremely vulnerable to coastal hazards and its stability is tenuous, both with and without the scattered rip-rap currently present. This is not unexpected given its low elevation relative to the ocean and its extremely erodable subsurface profile, including beach sand. Photos of the site during varying conditions (see exhibits B, F, and H) demonstrate this vulnerability, and it is further evidenced by the fact that the only previous residence at this location was washed into the ocean in 1983 within about a decade of its initial construction (see photos on pages 1 through 3 of exhibit H). RJA concludes that "the subject property is at risk from inundation by ocean storm waves," and that "any structure constructed on the site will be subject to high surf."[47] HKA indicates that wave and storm surge up to +30 feet NGVD can be expected over the next 100 years. Based on the historic storm event trends, and based on sea level rising, it is reasonable to presume that this site will be at risk from coastal flooding every year, with more severe storms leading to more significant flooding and damage every few years, and with the possibility that the historic "100-year storm" and the corresponding severe damage could occur multiple times throughout the coming century.

6. 30253 Stability Requirements

Among other things, Coastal Act Section 30253 requires that geologic and flood risks to life and property be minimized, and that development "assure stability and structural integrity." In this case, as described above, the risks at this site are significant. There is no portion of the site that would be expected to be stable over any length of time.[48]

Minimizing Risk

The Applicant has attempted to address these risks by proposing an atypical residential structure that is dependent on large concrete piers extending both above and below grade. Most of the remainder of the proposed development is designed to collapse and be washed into the ocean by storm surge that flooded the site and these structures, and to be replaced following such storms. The "disposable" elements of the project include: the lower level walls (including the loosely stacked 3-foot section of hollow concrete block at the base), framing, connectors, and concrete plank/beam flooring; all materials located in the bottom level garage area (such as vehicles and other things typically stored in a garage like garbage cans, bicycles, household tools, paints, oil, solvents, etc.); the driveway (whether a plank bridge and/or pavement on fill grade); and potentially the utility connections (such as the sewer line connecting to the County's sanitary sewer in East Cliff Drive).

---

46 RJA 2000a.

47 RJA 2000a.

48 As such, the project is inconsistent with the LCP policy requiring a stable building site (minimum of 100 years) in its pre-development application condition. This is the first variance to LCP Zoning Code requirements that would be necessary to allow the project.

Thus, although the Applicant's design attempts to respond to the significant geologic and flood risks at this site it has not minimized them as required by Section 30253. For example, during a storm that flooded the site and the residential structure, the lower portion of the structure, the driveway/bridge, and all materials in the lower portion of the structure would all be washed into the storm surge. The degree to which such materials would be pulled free would depend upon the severity of the storm surge and flooding, with the amount of such materials displaced increasing as a function of the severity of the storm. In a large enough storm that scoured the site to established scour depth, the connecting utility lines on the Applicant's parcel and the public utility lines (particularly at the connection points) could be threatened.[49] As described in the preceding section, coastal flooding could wash the site every year, with more severe storms leading to more significant flooding every few years. Flooding that reached the driveway/bridge portion of the residential development would be expected to damage these structures fairly readily because they would be constructed atop sand and fill that are easily eroded if tidal surge and storm flooding were to reach them. Thus, this inland portion of the development could potentially be damaged as often as a yearly basis, causing debris (such as fill, pavement, concrete planks/beams, vegetation, etc.) to be strewn about the site and surrounding area. The remainder of the proposed development (i.e., the residence itself) would be expected to be spared from lesser flooding and storm surge events that did not reach +14 NGVD (i.e., the elevation of the top of the perimeter beam system, and the base elevation of the break away walls and garage floor). However, flooding associated with more significant storms that reached above +14 NGVD (such as those estimated to occur every few years to five years)[50] would be expected to not only damage the inland driveway/bridge area, but also to damage the collapsible elements of the residential structure (by project design), and wash through of the garage area (picking up stored materials as it did so). Thus, the residential structure portion of the development could potentially be damaged as often as every two to five years, where break-away walls, framing, connectors, concrete blocks, concrete planks/beams, pavement, as well as all materials located in the bottom level storage area (such as vehicles and other things typically stored in a garage like garbage cans, bicycles, household tools, paints, oil, solvents, etc.) would be expected to be a part of this debris stream. In sum, while a matter of degree in each storm case, the overall residential development could potentially be damaged on an almost yearly basis, with more significant damages occurring every two to five years.

Furthermore, with the proposed concrete perimeter beam system, there will be an area below the concrete planks/beams and between the perimeter beams that would be exposed to storm and tidal surge in both winter and summer conditions. Ocean waters would extend under the beams at times and along the underside of the concrete planks of the garage, pushing through any openings.[51] This could suspend any materials on the garage floor and/or stored there (such as vehicular contaminants, bags of fertilizer, etc.), and/or wash the underside of vehicles themselves of similar residues, and cause significant

---

49 Because the LCP prohibits utilities in coastal hazard areas "unless they are necessary to serve existing residences," and because the utilities proposed here would be placed in a high coastal hazard area where they are not necessary to serve an existing residence, the project is inconsistent with the LCP on this point. This is the second variance to LCP Zoning Code requirements that would be necessary to allow the project.

50 RJA 2000a.

51 Much like rain water passes through deck boards; albeit in the opposite direction.

degradation to water quality. In larger events, it could push the planks/beams themselves loose. The same scenario holds true for the concrete plank/beam driveway/bridge as well.

The materials displaced in such storm events, including possibly any sewage from the sewer line should it be opened and exposed, would be dispersed around the beach, into the Monterey Bay, onto East Cliff Drive, and into Moran Lake County Park to the detriment of these public use areas, facilities, any persons in the area, as well as to the water quality and habitat values of the Lake and the Bay. Thus, as designed, the project poses a threat to life and property. Some of the consequences of the flood damage would be borne by the residents, but many other consequences would be borne by the public, other surrounding private landowners, and the local environment.

There are many things that could be done to further minimize these risks. For example, the breakaway walls, flooring, and storage areas in the garage could be eliminated, and vehicles and other materials prohibited in the lower floor. In addition, the driveway/bridge could be eliminated and off-site parking provided instead. The base of the stairway would need to be extended to a lower elevation (to account for scoured site conditions), but it is not clear what additional measures could be taken to ensure utility line stability.[52] However, if the project were to be reconfigured in this way, it would lead to other inconsistencies with the Coastal Act (such as degrading the view with an elevated concrete superstructure with a house on top located out on the beach). It would also raise questions as to what level of residential use could be provided if it were strictly limited to the upper floor with an off-site parking and storage area elsewhere, and whether it conflicted with other County Code requirements (such as requirements for on-site parking). If the "disposable" portions of the proposed project were not removed from the development, then they would have to be made stable themselves to minimize the risks. This could be accomplished by making them stronger and able to withstand flood events (e.g., thick concrete lower story walls, concrete flanked fill supporting the driveway, etc.), or by protecting them from storm events by other means (e.g., a concrete containment structure ringing the development area). However, again these types of changes would conflict with flooding requirements (LCP and FEMA), and the Coastal Act (that does not allow such protective structures with new residential development), respectively.

Finally, to address the risk of liquefaction, the concrete pier's vertical bearing and lateral resistance calculations omit the soils above the lagoon deposits.[53] However, the 15 feet or so of lagoon deposits and sand and gravel alluvium between the lagoonal deposit elevation and the Purisima elevation should also be removed from the calculations because the sand and gravel alluvium likely also would be susceptible to liquefaction. In other words, the project would need to neglect everything above the Purisima (in its design calculations) to address liquefaction risk, where all loads are borne on the Purisima Formation. It is likely that the depth of the concrete caissons would need to be extended deeper into the Purisima and/or the diameter of the piers increased to address this liquefaction issue and further minimize this risk.

---

52 This is partly because the details of the utility connections have not been finalized, and thus the changes that might be necessary, and the degree such changes raised additional Coastal Act issues, are unknown at the current time.

53 HKA 2000a.

Overall, the site poses a variety of significant geologic and flooding related risks. Although the proposed project has identified some steps to reduce these risks, the proposed project has not reduced them sufficiently (as seen from the range of risks still present, as discussed above). Although there are some additional measures that could be applied to further minimize risks, such risks cannot be reduced sufficiently without leading to other Coastal Act (and LCP) inconsistencies. The proposed project is thus inconsistent with Coastal Act Section 30253(1).

Assure Stability

Furthermore, Section 30253(2) requires that development "assure stability and structural integrity." As described above, the proposed project (other than the super-structure concrete framework, upper floor, stairway, and utility connections) has been designed to come apart in a storm that flooded the site and the residential structure. In other words, these "disposable" elements have not been designed to assure stability and structural integrity. Granted, this break-apart design is prompted by County code requirements requiring structures to be elevated above the anticipated flood waters to allow flood water to "pass-through" underneath,[54] but this does not negate the fact that a substantial amount of the lower portion of the residence (and everything in it) and the driveway/bridge is meant to be washed out in such a storm. Further, as discussed above, the utility connections and related development might also be demolished or rendered non-functional in such an event. Even much less significant storms would be expected to wash under the concrete perimeter beams and through the garage and bridge floors. While the upper floor of the residence and its supporting foundation can be designed to withstand a major flood event, many of the associated elements that are a normal part of most residences (an enclosed garage, storage area, lower story floors, driveway, parking area, etc.) cannot be designed for such conditions, and as such, the project, in total does not assure stability and does not assure structural integrity and is inconsistent with Section 30253 in this regard. The overall project cannot be made stable over the long term without leading to other Coastal Act (and LCP, and more general residential standards) inconsistencies.[55] In short, the site constraints, such as its beach location and elevation relative to the ocean, make long-term stability at this location unachievable without causing significant harm to the beach and other public resources at this shoreline location. The proposed project is thus inconsistent with Coastal Act Section 30253(2).

7. 30235 and 30253 Shoreline Protection Requirements

Section 30235 requires that construction that alters natural shoreline processes (like shoreline

[54] Note that the LCP requires the upper level, including the upper level floor supports themselves, to be raised at least one foot above the one-hundred year flood level (16.10.070(f)(3)(vi) and 16.10.070(h)(5)(iii)). Based on the 100 year flood elevation established by HKA at +30 NGVD, this means that the structural portion of the lower floor would have to be at elevation +31 NGVD or above. It is proposed at +30 NGVD. This is inconsistent with the LCP and is the third variance to LCP Zoning Code requirements that would be necessary to allow the project. Given that the 100-year flood elevation was based on a 1-foot estimate of sea-level rise, the flood elevation would be even higher if a higher estimate (up to the almost 3 feet estimated by the International Panel on Climate Change) were used. In any case, if the Applicant were to agree to raise the elevation of the upper floor to meet LCP flood elevation requirements (whether one foot or more than one foot), it would make the overall structure even taller than the 28 foot limit that it already exceeds (see also "Scenic Resources and Community Character" section that follows).

[55] This is also inconsistent with the LCP requirement that development be stable over 100 years (16.10.070(h)(1)(ii)), and is the fourth variance to LCP Zoning Code requirements that would be necessary to allow the project.

protection) be permitted only if that construction is required to (1) serve coastal dependent uses; (2) protect existing structures; or (3) protect public beaches. Similarly, Section 30253 requires that new development not need "protective devices" that would substantially alter natural landforms along bluffs and cliffs. This prohibition on protective devices means that the project cannot include a protective device in its initial construction, and it cannot require a protective device at any point in the future for the life of the project. In other words, the Coastal Act does not allow protective devices or other construction that alters natural shoreline processes with new residential development. The Coastal Act provides these limitations because such development can have a variety of negative impacts on coastal resources including adverse affects on sand supply, public access, coastal views, natural landforms, and overall shoreline beach dynamics on and off site, ultimately resulting in the loss of beach.

Normally, the Commission addresses coastal erosion hazards by requiring new development to avoid such hazards (erosion, bluff retreat, flooding, etc.) by siting such development away from the hazardous area; the area between the hazard and the development is often called a "setback." Typically, the setback distance established is meant to provide adequate area for natural erosion processes to occur without requiring armoring within the project's design lifetime (often assumed to be 100 years[56]). However, at a site like this that is on the beach, setting the project back to allow natural processes to continue is not an option. Thus, the project has instead been designed to go up (above) the hazardous area. In order to achieve the required elevation, the living area of the house would be supported by a massive concrete structure of piers and horizontal beams, including a wave recurve on its seaward side designed to protect the upper floor from the significant coastal hazards at this location. The concrete super-structure is a protective device, and is more aptly described as a shoreline protection structure.[57] In other words, the traditional "setback" has been replaced by a protective device designed to achieve a similar result.

Alteration of Natural Shoreline Processes and Landforms

This proposed development consists of construction that would alter natural shoreline processes and the natural landform in multiple ways. The natural shoreline process at this location is currently one of ongoing shoreline erosion (estimated by the Applicant's geologist at 1.5 feet per year on average without the rip-rap) and natural beach creation/shaping. Construction of the proposed large fixed structure on and adjacent to an eroding shoreline will adversely impact the ongoing natural processes

[56] History has proven that coastal real estate does not have such an economic lifetime. Rather, the development lifetime for shoreline real-estate is essentially infinite with armoring. Over time, even well set back development will require some manner of shoreline protection. This is the case even if these structures were built to a one-hundred year setback, and even if the need does not arise for one-hundred year. Note that the Commission and local government is increasingly being confronted with applications for armoring to protect development that was set back for one-hundred years of erosion, but that is already in danger. In some cases, the subsequent armoring application follows within a few years.

[57] The County's LCP is informative in this regard, and supports this interpretation. The LCP defines shoreline protection structure as "any structure or material, including but not limited to riprap or a seawall, placed in an area where coastal processes operate." The entire development in this case is clearly proposed in an area where coastal processes operate, and constitutes a shoreline protection structure by LCP definition.

that are critical to the creation and maintenance of sandy beach area.[58]

In addition, the residential structure proposed would cover about 800 square feet of back beach area, and would block about 45 linear feet of shoreline inland. As a result, this footprint area and the area inland of it would be completely blocked from natural shoreline processes part of the year (when sand levels are as high as the base of the concrete perimeter beams), partially blocked at all times (where the caissons permanently occupied beach area), and diminished when sand levels were lower than the beams (because the area would be accessible to the remainder of the shoreline system, but the piers and any driveway/bridge fill would deflect and otherwise change its natural function, both under the structure and the degree to which the natural system interacts with the more inland portions of the site). Thus, the project would alter the natural landform, as well as halt and significantly diminish ongoing natural shoreline processes and backshore erosion at the site. This would lead directly to an immediate loss of some beach landform, as well as a loss of more beach over time due to passive erosion. In addition, the fill area immediately adjacent to East Cliff Drive on the property (that would be blocked from the shoreline system) contains large amounts of sand material that would thus be blocked from entering into the sand supply system here, limiting the amount of materials that would otherwise be available to promote sandy beach retention and formation.

Thus, the proposed project includes protective devices that would alter natural shoreline processes and the natural landform in multiple ways, and both 30235 and 30253(2) apply in this regard.

30253 prohibition on landform altering protective devices

The proposed project includes a protective device with its initial construction. This is inconsistent with Coastal Act Section 30253(2). In addition, it appears likely that the proposed project could, if constructed, require construction of more protective devices in the future. For example, the driveway/bridge connecting the garage to East Cliff Drive would be immediately susceptible to erosion, as would the hammerhead portion of the driveway. The materials underlying the broken concrete slab in this area are all sand with a thin topping of sand, gravel and rubble fill.[59] These materials would erode quickly leading to a need to install some form of protective device (like a vertical concrete containment wall at the bridge abutment and the hammerhead, or an armored fill) to maintain access to the residence. Similarly, the stairway would need to be accessed by a bridge or fill of some sort, and the materials at the stairway access (also sand) would also be expected to wash out regularly. It is predictable that this constant loss of access to the stairway would prove unacceptable to the resident, and additional (and more permanent) measures would be required to connect this gap to the inland road and the bridge system. In addition, the utility line connections (including any necessary backup holding systems,

[58] On an eroding shoreline fronted by a beach, the beach will be present as long as some sand is supplied to the shoreline and the beach is not submerged by sea level rise. As erosion proceeds, the beach also retreats. This process stops, however, when the retreating shoreline comes to a hard structure. While the shoreline on either side of the structure continues to retreat, shoreline retreat in front of the structure stops. Eventually, the shoreline fronting the structure protrudes into the water, with the mean high tide line fixed at the base of the structure. In the case of an eroding shoreline, this represents the loss of a beach as a direct result of the structure. These effects are also known as "passive erosion."

[59] RJA 2000a and 2000b.

wastewater pump apparatus, etc.) may require more substantive protective devices than are known at this point to assure their stability.[60] Each of these protective devices would alter the natural landform and natural shoreline process, with the degree of alteration dependent on the type of device.

In addition, the combination of sea-level rise and the expected increased frequency and severity of coastal storms combine to increase the likelihood that the entire development, including the residential structure itself, will require additional more substantive protective devices at some point in the future. If a residence were constructed, and erosion and storm events led to the types of hazard problems identified above, it is likely that the resident would pursue more substantive protective devices. It is also likely that the resident would assert a right to protect their existing structure, even though it would have been constructed pursuant to Section 30253 that required that it not ever need such armoring.[61] In any case, it is likely that the residential development as a whole could require additional protective devices at some point in the future.

However, the construction of such protective devices, both in the immediate and longer term, is prohibited by Section 30253(2). Even were the Applicant to agree to a condition for no future shore protection, it is very likely that this Applicant or future property owners will find it impractical or impossible to continue to occupy this structure without some future additional protection.

30235 allowable shoreline construction

Section 30235 requires that construction that alters natural shoreline processes be permitted only if that construction is required to (1) serve coastal dependent uses; (2) protect existing structures; or (3) protect public beaches. Because the proposed development is not required to serve coastal-dependent uses, protect existing structures, or protect public beaches, it is inconsistent with the criteria of Section 30235.[62]

8. Geologic Conditions and Hazards Conclusion

---

60 Again, the details of the utility connection have not yet been established, and would follow if the project were approved (according to the Applicant's engineer).

61 This tension between Sections 30253 (that requires development to be constructed without current or future armoring) and 30235 (that allows armoring to protect existing structures) has been present since the Coastal Act was written. It hinges in large measure on what constitutes an existing structure. The Commission has generally interpreted "existing" to mean structures existing at the time the armoring proposal is being considered, whether these structures were originally constructed before or after the Coastal Act, and has not limited consideration of armoring only to those structures constructed prior to the Coastal Act. Note that there is litigation pending in San Francisco County Superior Court (case number CPF 03503643, *Surfrider Foundation v. California Coastal Commission*) regarding this interpretation of "existing structures" based on a recent Commission decision in a Pismo Beach seawall case (A-3-PSB-02-016; Grossman-Cavanagh). In their petition, the Surfrider Foundation challenges the interpretation that existing structures mean structures existing at the time if the decision, alleging instead that the term "existing structures" (per Section 30235) refers to structures existing prior to the enactment of the Coastal Act. As of the date of this staff report, no decisions have been reached in the case.

62 This is also inconsistent with the LCP requirement that shoreline protection structures (which this project represents by LCP definition) are limited to those structures "necessary to protect existing structures from a significant threat" (LUP Policy 6.2.16 and IP Section 16.10.070(h)(3)). This is the fifth variance to LCP Zoning Code requirements that would be necessary to allow the project. Note that there is a similar LCP prohibition against flood control structures in the floodplain that also provides guidance in this regard (IP Section 16.10.070(f)(8)).

The site is subject to extreme geologic and coastal hazards. However, the design is inconsistent with Section 30253 because the proposed project (other than the super-structure concrete framework, upper floor, stairway, and utility connections) has been designed to come apart in a storm that flooded the site and the residential structure. While the upper floor of the residence and its supporting foundation can be designed to withstand a major flood event, many of the associated elements that are a normal part of most residences (an enclosed garage, storage area, lower story floors, driveway, parking area, etc.) cannot be designed for such conditions, and as such, the project, in total does not assure stability and does not assure structural integrity and is inconsistent with Section 30253 in this regard. Rather, the project as proposed is a hazard itself (to other persons and property nearby). In addition, the proposed project would negatively affect natural shoreline processes, substantially alter the natural landform, and is not designed to protect an existing structure. It has not been sited, designed, and built to negate the need for shoreline (and shoreline process) altering protective structures, either during initial construction or possibly over the life of the project.

The proposed project is inconsistent with Coastal Act Sections 30235 and 30253 as discussed in the above finding.[63] Because of the site constraints, including the low elevation back beach location at the dynamic interface between the ocean and the land, there are not any feasible project modifications that could make the project consistent with Sections 30235 and 30253.

B. Scenic Resources and Community Character

1. Applicable Policies

Coastal Act Section 30251 protects coastal viewsheds. Section 30251 states:

> ***Section 30251.*** *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

Similarly, Coastal Act Section 30240(b) also protects parks and recreation areas, such as those present both seaward (i.e., the beach) and inland (i.e., Moran Lake County Park) of East Cliff Drive at this location against significant visual degradation. Section 30240(b) states:

> ***Section 30240(b).*** *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

[63] It is also inconsistent with the LCP, including the policies cited in this finding.

Finally, Coastal Act Section 30253(5) protects community character. Section 30253(5) states:

> ***Section 30253(5).*** *New development shall where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.*

2. LCP Policies

The LCP is highly protective of coastal zone visual resources (LUP Objectives 5.10 et seq). Applicable LCP policies dictate protection of public views through "minimizing disruption" (LCP Policy 5.10.3) so as to "have minimal to no adverse impact upon identified visual resources" (LCP Objective 5.10.b). LCP Policy 5.10.3 concludes that screening shall be provided where development is "unavoidably sited" within visual resource areas, meaning that siting in such viewsheds is to be avoided. Ocean vistas are to be "retained to the maximum extent possible" (LUP Policy 5.10.6), and development in view of public beaches is prohibited unless it is required for existing lots of record and for shoreline armoring, provided its compatible with the surrounding built and natural environment (LUP Policy 5.10.7). Enhancement of visually blighted development is required with development approval (LUP Policy 5.10.9). The LCP requires that development "be visually compatible and integrated with the character of the surrounding neighborhoods or areas" and sensitively designed "so that its presence is subordinate to the natural character of the site," and requires protection of beach area "scenic integrity" by such measures as prohibiting most development in this area (IP Section 13.20.130).[64]

In sum, although not the standard of review, the guidance provided by the certified LCP as it relates to this site is to avoid any development on it (because the site is on the beach; extremely visible from public use areas such as the beach, ocean, East Cliff Drive, and Moran Lake County Park; and it provides through ocean views across it from East Cliff Drive and Moran Lake County Park), and to ensure that any development that must be allowed (e.g., for takings reasons) avoids adversely impacting visual resources by seamlessly integrating it into the beach/Park viewshed and Pleasure Point community aesthetic.

3. Existing Viewshed

As described earlier, the site is at the "gateway" of sorts to the Pleasure Point portion of the Live Oak beach area; an area extending roughly from Moran Lake to Opal Cliffs (see exhibits A and B). This area has an informal, beach community aesthetic and ambiance that clearly distinguishes it from inland commercial areas as well as the downcoast Opal Cliffs neighborhood towards Capitola. Housing stock is eclectic, and generally densely crowded together. Though certainly in the midst of a gentrification that has intensified over the last decade or so, particularly along the immediate shoreline, the Pleasure Point area retains its informal charm and appeal, much of it rooted in the intrinsic relationship between the

[64] Note that Section 13.20.130 provides general coastal zone wide requirements, but also provides specific requirements for beach viewsheds (in subsection d). 13.20.130(d) requires, among other things, as follows: "The scenic integrity of open beaches shall be maintained. No new permanent structures on open beaches shall be allowed, except where permitted pursuant to Chapter 16.10 (Geologic Hazards) or 16.20 (Grading Regulations). The design of permitted structures shall minimize visual intrusion, and shall incorporate materials and finishes which harmonize with the character of the area. Natural materials are preferred."

developed environment – and its inhabitants – and both the sandy beach and offshore wave recreational areas (for bodysurfing, skimboarding, surfing, etc.).

The site is located at one of only four locations in the Live Oak beach area where coastal vistas from East Cliff Drive (the first through public road) are available.[65] This is due to the pattern of development in Live Oak where substantial residential development has occurred seaward of East Cliff Drive that mostly blocks any available coastal vista from the road. This is in contrast to some other nearby urban areas where the first through public road is located immediately adjacent to the ocean, and residential development is confined inland of it (for example, West Cliff Drive in the City of Santa Cruz). East Cliff Drive is an important recreational and other access facility that is used by a significant number of people (i.e., drivers, joggers, bicyclists, walkers, etc.) on an everyday basis. Given the finite amount of such open coastal vista available in the Live Oak beach area, and the significant use of East Cliff Drive by the public, the subject site's contribution in this regard is magnified.

The County's Moran Lake County Park facility is directly inland of the site. Views of the beach and ocean from the Park are available from the parking lot, the inland trail (connecting inland to 30th Avenue), and the seaward trail (that connects from Moran Lake County Park to East Cliff Drive further downcoast).

Given its beach location, the site is also located directly within the inland public view from both the beach and offshore. This inland view is currently occupied by Moran Lake County Park and its large trees and foliage extending inland and framing the Lake proper. As described earlier, this beach area is a heavily used recreational beach and offshore surfing, skimboarding, and bodysurfing area that attracts significant numbers of users to it. The inland view, open through to the natural environment as opposed to strictly to houses (as is more typical for Live Oak beach areas hemmed in by a built up and out residential environment), contributes to the desirability and value of this beach and offshore recreational experience, and is inherently a part of it.

In sum, the site is located within a significant public viewshed and a highly scenic area. The scattered rip-rap, broken concrete, and rope fence along East Cliff Drive at the site degrade the viewshed. Notwithstanding these ongoing impacts, the mostly open viewshed at this location is a resource of tremendous public importance, for which protection is required by the Coastal Act policies listed above. See project area photos in exhibit B.

4. Proposed Development in the Viewshed

As previously described, the Applicant proposes a large structure within the public viewshed. The residential structure is not a typical nor a traditional shape as compared to residential stock in coastal Live Oak, and statewide. The upper story is significantly larger than the lower stories, with a large mass of cantilevered deck (and corresponding "overhang" area below) reminiscent of a triangular mushroom shape on a residential scale. The roughly 7-foot high "void" story between the garage and the upper floor elongates the bottom portion of the structure and reinforces the vertical element of it. The best way

[65] The others are at Schwan Lake, Corcoran Lagoon, and between 32nd and 41st Avenues.

to get a sense of the development proposed in this regard is to review the site plans and elevations in exhibit D, the photo-simulations provided by the Applicant in exhibit E, and photos of the staking and netting temporarily constructed to approximate the proposed development in exhibit F.

General Mass and Scale

Oftentimes residential and other development is quantified in terms of its gross square footage as a means of understanding the mass and scale proposed.[66] In this case, because of the unusual configuration, a traditional square footage calculation for the residence is tricky, and potentially misleading. In some ways, the square footage of the residence is irrelevant to the viewshed issues at hand. That said, it can help inform the discussion.

There are at least two ways to characterize the mass proposed here. The first is a bulk calculation meant to quantify the volume of the structure proposed in terms of its perceived square footage, and the second is to calculate the LCP FAR. In terms of the latter, the maximum allowed FAR is typically skewed in these types of cases because the LCP does not distinguish between constrained and not constrained portions of sites. Because areas within parcel boundaries that are constrained in certain ways (e.g., with sandy beach, steep slopes, ESHA, etc.) are still are used to generate an allowable FAR figure, this figure can be bloated for constrained sites like this.[67] In addition, the LCP's FAR calculation methodology is complex, and subject to some interpretation. With those caveats, in this case the proposed FAR is 3,316 square feet and the allowed FAR is 2,539 square feet.[68]

For a more standard bulk calculation for the structure, the square footage of each of the stories of the structure are added together. Even this is complicated by the fact that the lower area includes a "void" story. That said, this "void" story contributes to the perceived sense of bulk as much as a regular interior space would. In fact, it is a full 18 feet from the floor of the garage to the floor of the upper story, and both the garage and void area are considered "stories" for this purpose.[69] The garage floor is 756 square

---

66 There are generally two purposes for developing square footage calculations: first, to quantify the sense of bulk associated with the structure; and second, for use in verifying that the structure is within the allowed coverage and floor area ratio (FAR) for the zoning district in which it is located. While not mutually exclusive, these are two different purposes, with the latter a function of the County's LCP (that is not the standard of review but can provide guidance in this case).

67 FAR is based on "net site area," and net site area does not distinguish between constrained versus non-constrained land. Rather, the LCP defines net site area as "the total site area less any public or private rights-of-way designated for vehicle access" (LCP Section 13.10.700-S). In other words, only rights-of-way are subtracted from the overall parcel size for this purpose. In this case, the sandy beach area within the parcel boundary can be used to justify increased floor area. In this case, gross parcel size is 6,131 square feet, and the parcel includes a 17.5 foot strip of vehicular easement land (for East Cliff Drive) on the northeast side of the parcel that totals 1,053 square feet. Thus, the net site area is 5,078 square feet. Because maximum allowed FAR is 50% of the net site area in the subject residential zoning district, maximum allowed FAR in this case per the LCP is 2,539 square feet.

68 The floor area of the bottom floor (including those areas under the above deck/roof projections that apply to this figure per the LCP) is 1,563 square feet, for the middle void floor is 756 square feet, and for the upper floor is 1,222 square feet (including those areas under the above roof projections that apply to this figure per the LCP. Thus, total floor area is 3,541 square feet. The LCP allows a 225 square foot credit for one parking space, and a 140 square foot credit for the first 140 square feet of covered porch area. Thus, the total FAR is 3,176 (or 63%). This is the sixth variance to LCP requirements that that would be necessary to allow the proposed project.

69 The LCP provides some guidance on this point, defining "story" as follows: "Story. For planning and zoning purposes, that portion of a building included between the upper surface of any floor and the lower surface of the floor or ceiling above. An attic, basement, mezzanine, or under floor does not count as a story." The void story does not qualify as an attic, basement, mezzanine, or under floor.

feet. The middle uninhabitable "void" area is likewise 756 square feet. The upper habitable story totals 1,423 square feet (936 square feet interior space, 89 square feet for the exterior stairway,[70] and 398 square feet of exterior decking (some covered and some not covered by the roof)). The upper story cantilevered deck and stairway with solid barrier wall is large in comparison to the interior space (over 50% of the size) and contributes to the structural bulk, both those portions that are covered and those that are not (see exhibits D, E, and F). Thus, calculating the bulk of the top and the base of the "mushroom" separately in this way results in a bulk figure of approximately 2,935 square feet.[71]

Thus, the massing of the proposed structure ranges from approximately 2,900 square feet (volume) to approximately 3,300 square feet (FAR), depending on the methodology used.

In terms of proposed coverage, there are several ways of estimating coverage. Sometimes coverage refers to the residential footprint, other times it refers to impervious surfacing, and other times it is simply the amount of a parcel covered by structures; it is the latter that is used here.[72] The project proposes 3,925 square feet of coverage, or 64% coverage.[73] In other words, approximately two-thirds of the site would be covered with the proposed project.[74]

Height

Similar to the difficulty in describing the structure for FAR and coverage, the atypical site (on the beach) makes assigning a value to the proposed structure's overall height tricky as well. The structure proposed would extend 28 feet above the residence's garage perimeter beam elevation.[75] However, as described earlier, the elevation of the area where the residence is proposed is uneven and varies from +5

Thus, it is considered a story for planning and zoning purposes. Note that, because the maximum number of stories allowed in the subject residential zoning district is two, this is the seventh variance to LCP Zoning Code requirements that that would be necessary to allow the proposed project.

70 The exterior stairway runs through the first and second stories, but is only counted here once (in the second story) because it is not a continuously sheathed, but rather overhangs an "open" space below it.

71 Where the garage and the middle "void" story are both 756 square feet, and the upper level is 1,423 square feet.

72 The LCP is informative in this regard. It allows a maximum of 30% parcel coverage in this residential district, but doesn't define either "parcel" or "coverage." The LCP does define "lot" as "a parcel of land designated on a subdivision final map or parcel map." Thus, "lot" is equivalent to "parcel" in this sense. The LCP defines lot coverage as "the percentage of the lot covered by structures, measured by dividing the horizontal area covered by structures, not including eaves or uncovered cantilevered decks, by the horizontal area of the lot." The LCP defines a structure as "anything constructed or erected which requires a location on the ground, including a building, but not including a swimming pool, a fence, or a wall used as a fence, or a deck less than 18 inches in height. In other words, the LCP refers to structure coverage.

73 Based on the first floor footprint (756 square feet), stairway landing (14 square feet), driveway (1,022 square feet), rip-rap in the southern portion of the site only (because the rest is unpermitted) (1,303 square feet), the portion of the deck not extending over the rip-rap (139 square feet), the portion of the concrete weir on the property (37 square feet), and the portion of East Cliff Drive pavement on the property (655 square feet). Even if East Cliff Drive were excluded from this calculation, the total would be 3,270 square feet (or 53%).

74 Note that, unlike FAR that is based on net site area, LCP coverage calculations are based on the overall parcel size. The subject parcel in this case has a gross parcel area of 6,131 square feet. Because allowable maximum coverage in the subject residential zoning district is 30% of the gross parcel area (or 1,839 square feet), this is the eighth variance to LCP requirements that that would be necessary to allow the proposed project.

75 The maximum height in the subject residential zoning district is 28 feet.

NGVD (winter beach profile) to +10 NGVD (summer beach profile).[76] The proposed house location is also occupied by scattered rip-rap at varying elevations, but this rip-rap is not considered a baseline elevation for the site because it is not permitted.[77] Because the grade at the building footprint varies considerably, and is less than the garage perimeter beam elevation at +14 NGVD, the actual perceived height of the structure would be something greater than 28 feet when compared to these elevations.[78] Thus, although difficult to assign a clear number to structure height, it is fair to say that the structure would range in height from 32 feet (as measured from a summer sand profile) to 37 feet (as measured from winter scour).[79] Following a significant storm event that scoured the site down to the historic scour line as described by RJA and HKA (i.e., down to elevation –2 NGVD), the height of the structure would be 44 feet above beach grade with an elevated wharf appearance (i.e., with the upper floor perched atop the four caissons) (see cross section of proposed structure on page 3 of exhibit D).

Setbacks

Setbacks are generally used to integrate development on a site with adjacent sites in different ways. For example, front yard setbacks are often used to ensure that development doesn't loom over public streets, rear yard setbacks are often used to buffer other homes or uses rear of structures, side yard setbacks often are meant to provide adequate separation between adjacent structures. Like the mass and scale tools above, setbacks can help to define an appropriate maximum scale for development.

In this case, setbacks relate to how close the project would be to public use and viewshed areas. The proposed project has been proposed within 5 feet of the rear (seaward) property line and within 14 feet of the East Cliff Drive Roadway easement. The County's LCP Zoning Code requires a minimum 15-foot rear yard setback and a minimum 20-foot front yard setback (as measured to the road right-of-way pursuant to County Code Section 13.10.700-Y). The proposed project does not meet these setback requirements.[80] As a result, the mass, scale, and height of the structure described above is proposed even closer to the ocean (and into the beach area) than allowed by the LCP, increasing its sense of mass in this regard.

5. Coastal Act Consistency

Several tools are available that are useful for evaluating the proposed project's impact on the public viewshed. These include computer photo simulations submitted by the Applicant (exhibit E), staking

---

76 RJA 2000a and 2000b.

77 Even if it were to be permitted, the rip-rap extends at its highest points (i.e. at individual rock edge projections) to +14 NGVD, and includes substantial area that is less than this; all the way down to the sand elevation. As shown on the surveyed plans, and the geologic cross sections (RJA 2000a, RJA 2000b, HKA 2000a, HKA 2003) the spot elevations within the rip-rap range from +10 NGVD up to a maximum in spots of +14 NGVD. Thus, even if it were appropriately permitted, the varied base elevation is less than +14 NGVD overall (e.g., on average and at its lowest points).

78 Note that the LCP calculates structure height from the lower of existing or finished grade. LCP Section 13.10.700-H states, "the height of a structure is the vertical distance between the existing or finish grade, whichever is lower, to the uppermost point of the structure."

79 Because the maximum height allowed in the subject residential zoning district is 28 feet, this is the ninth variance to LCP Zoning Code requirements that that would be necessary to allow the proposed project.

80 These are the tenth and eleventh variances to LCP Zoning Code requirements that that would be necessary to allow the proposed project.

and netting that was erected to approximate the mass of the structure (see photos of staking in exhibit F), and the project plan elevation sheets (see exhibit D).

Blocked Public Views

The proposed development would block a major portion of the beach and ocean view (from inland Moran Lake County Park and East Cliff Drive). Roughly one-fourth of this open view corridor (where the beach meets East Cliff Drive opposite Moran Lake) would be blocked off and unavailable in the future.[81] This impact is magnified for northbound users of East Cliff Drive and users of the inland path looping around Moran Lake because the extension of a residential structure across this site would essentially block the entirety of the currently available ocean view until one were to pass the site. Such development does not protect the existing beach and ocean view, but rather interferes and directly removes this view area from public use.

Likewise, and in a similar manner and to a similar degree, the proposed development would block a major portion of the inland view of the trees and natural environs of Moran Lake County Park as seen from the beach and offshore water recreation areas. Such development does not protect this view, but rather interferes and directly removes this view area from public use.

The proposed removal of significant through public views is inconsistent with Coastal Act Sections 30240, 30251 and 30253.[82]

Degradation Of Both The Remaining Public Viewshed And Community Character

In addition to leading to the direct loss of through views (both inland and seaward views) by blocking them, the proposed project would also introduce a decidedly unnatural and unusual structure into the public viewshed of the beach, offshore (and particularly nearshore), East Cliff Drive, and Moran Lake County Park.

The structure would be about 8 feet taller than the Applicant's existing adjacent residence, and roughly the same height above East Cliff Drive as the next downcoast residence (that itself is located at a

---

81 Because the project provides openings in the garage on both sides, a small portion of this view could remain when looking directly through the garage (provided, of course, cars or other materials weren't located in such a manner as to block this through view). However, this tunnel-type peek-a-boo view would only be available in glimpses from directly inland locations, would be blocked by vehicles and other stored materials, and would provide insignificant reductions to the view blockage impacts described.

82 In addition to the aforementioned inconsistencies with LCP Zoning Code requirements for the allowed number of stories, FAR, coverage, building height, front and rear yard setbacks, the project is thus also inconsistent with LCP policies requiring protection of public views through "minimizing disruption" (LCP Policy 5.10.3) so as to "have minimal to no adverse impact upon identified visual resources" (LCP Objective 5.10.b). The proposed project has not been unavoidably sited within the viewshed (and such siting in the beach viewshed is prohibited) (see also "CDP Determination Conclusion – Denial" section), and even if it were, it has not provided screening as required (LCP Policies 5.10.3 and 5.10.7). The ocean vista has not been "retained to the maximum extent possible" (LCP Policy 5.10.6). Finally, such structure does not maintain the scenic integrity of the beach viewshed, has not minimized visual intrusion, and is not an allowed structure on an open beach (LCP Section 13.20.130). The latter being the twelfth variance to LCP Zoning Code requirements that that would be necessary to allow the proposed project.

significantly higher elevation).[83] It would be significantly taller than the upcoast one- and two-story conventional residence that frames the other half of the through view corridor at Moran Lake. Although there are a variety of heights, and a range of one and two story residences surrounding the site, the proposed structure would be as massive as the largest structures found in the immediate area, and larger than most. The difference is that other larger residential structures in the vicinity are incorporated into the existing developed framework while this one would be on the beach. This structure's mass would loom over the recreational beach area, inland East Cliff Drive, and inland Moran Lake County Park, degrading the viewshed for the users of these public resources.

Also, the structure's proposed architectural style is unusual, and would be unlike residential development typically found in coastal Live Oak. Cantilevered structures and flat roofs, such as that proposed here, are not typical of residential stock found in the area.[84] Overhanging and cantilevered elements tend to reinforce the perception of mass, making the structure seem even more massive and imposing as it looms over a smaller base.[85] This is also reinforced by the solid deck walls at the perimeter of the upper floor decking and the stairway that serve to accentuate the massing of the upper floor. This "looming" phenomena would be particularly evident following storm events that scour the site, and even more so when the lower sheathing was washed away to expose the concrete caissons and piers elevating the upper floor of the residence. Flat roofs generally lack residential aesthetic and design charm (as opposed to some amount of roof pitch), and the exterior painted plywood sheathing with bats proposed only serves to reinforce the starkness of the structure, and doesn't help its integration into the viewshed aesthetic.[86] Finally, the upper floor contains significant window area. Although the windows appear darkened in the elevation and photo simulations submitted (see exhibits D and E), there is no indication that the window glazing would be darkened and/or non-reflective. Glares coming off the proposed windows in daytime, and lights coming from inside the house through them at night (in addition to the type of exterior lighting typically associated with residential development), would impact beach, park, and offshore users and incrementally diminish their recreational experience. Because this structure is proposed to jut out into the beach, its impact in this regard would be magnified.

Visual impacts due to development can sometimes be softened by appropriately sited landscaping. In this case, the Applicant proposes landscaping, including several trees and shrubs, in the area between East Cliff Drive and the residential structure (see exhibit D). There are several reasons why this landscaping is not expected to soften visual impacts in this case. First, it is proposed in areas that are sandy beach, and some gravelly fill, and it is not likely that the plants proposed can be successfully grown in these soils. Second, the planting areas will be subject to regular tidal influence and more

---

83 The existing viewshed photos show that the next downcoast residence towers over the beach and East Cliff Drive. See exhibit B.

84 Although the Applicant's existing residence adjacent to the site includes a flat roof, such design is the exception and not the norm.

85 In the opposite, upper floor elements of structures that are pulled back from lower story elements tend to decrease the perception of mass.

86 Note that the proposed structure's design treatment mimics the exterior treatment and flat roof of the Applicant's adjacent residence. However, like the residence proposed, the adjacent residence is atypical residential construction that does little to enhance the character of the community. In this sense, although it does provide a good example of the proposed design treatment, it does not provide a design that should be emulated if the community character is to be protected and enhanced at this extremely visible location. See photos of the existing residence in exhibits B, E, and F.

significant storms at times. It is unlikely that the trees and shrubs will remain in place for any length of time, and very likely that they will be washed out, particularly the primary planting area north of the driveway/bridge. Third, even if some of the plants were to survive, they would be at a lower elevation than the foundation for the house, and, other than the cypress trees, unable to provide significant screening in this regard. Fourth, the surviving plants would only be inland of the house, and not seaward, and thus would not function to soften the imposing facade of the structure as seen from the beach. Fifth, the proposed landscape plan for the project includes a series of non-native and invasive plant species (for example, *Myoporum laetum*). These types of invasive pest species are not native to the area, and because of this they do not promote or emphasize a natural back beach vegetation aesthetic, and they out-compete and exclude native plants (altering nutrient cycles, hydrology, and hybridizing) leading to expansion of the pest species outside of the project boundaries and increasing the impact in this regard.[87] And finally, a portion of the plants would be located within the County's easement along East Cliff Drive. This easement area is only allowed to be used for public roadway purposes. Because East Cliff Drive is narrow and provides inadequate public access, it is likely that the easement area will be used for public access improvements in the future (see also "Access and Recreation" section that follows). At that time, any plants would be removed, and the degree to which they helped screen the development would be eliminated.

In addition, during and following large storm events, portions of the residential development below the upper floor (including the breakaway garage walls, any materials or cars stored in the garage, and the materials associated with the inland driveway/bridge area) would be expected to be littered across East Cliff Drive, into Moran Lake County Park, across the beach, and into the Monterey Bay (see the "Geologic Conditions and Hazards" section preceding for more detail on this point). As previously described, the degree to which such materials would be swept into the storm surge is a function of the severity of the storm.[88] These materials would degrade the coastal viewshed, and would significantly degrade the viewshed in more severe storm events. Even during fairly normal tidal (i.e., non-storm) events, not themselves capable of washing out the lower portion of the structure as designed, ocean waters would be expected to wash under the house and could potentially lead to similar (if lesser by degree) impacts.

In sum, the proposed structure would significantly block and degrade the public viewshed associated with beach, the Park, the near shore ocean (wave impact and wash areas), and the offshore ocean (on the Monterey Bay), and it would be inconsistent with the character of both its beach setting and the

---

87 Furthermore, the Commission's practice in the Live Oak beach area, particularly along the immediate shoreline, has been to prohibit non-native invasive species, to require that they be removed, and to require that non-invasive native species be planted in replacement to help unify the back beach area vegetation in a manner designed to evoke a natural (and endemic to Live Oak) bluff and back-beach aesthetic. These projects are also coordinated between individual property owners along the shoreline, thus leading to a more coherent visual pattern as seen from the beach Most recently (at the Commission's January 2004 meeting), for example, this native plant methodology was incorporated into the Commission-approved repair CDP for the bluff area seaward of the immediately adjacent upcoast residence (CDP 3-03-016, Lang).

88 Based on the historic storm event trends, and based on sea level rising, it is reasonable to presume that this site will be subject to coastal flooding every year, with more severe storms leading to more significant flooding and damage every few years, and with the possibility that the historic "100-year storm" and the corresponding severe damage could occur multiple times throughout the coming century (see the "Geologic Conditions and Hazards" section preceding for more detail on this point).

developed environment (or community character) of the Live Oak beach area. It would not protect the view along the ocean (of which this site is a part), it would not be subordinate to the character of its setting, it would not be visually compatible with the character of the surrounding area, and it would not enhance visual quality (all 30251 requirements). It would not protect the special character of the area, a character that is a part of the reason this is a popular visitor destination point (30253(5) requirement). It has not been sited and designed in a way to prevent significant degradation of the recreational use areas surrounding (and in some cases including) the site, and its construction would not be compatible with the continuation of those recreational values (30240(b) requirement). The photos of the staking/netting, the photo simulations, and the proposed elevations (see exhibits D, E, and F) show that the proposed project would significantly degrade an important and heavily used public viewshed (see site area photos in exhibit B). The proposed project is thus inconsistent with Coastal Act Sections 30240(b), 30251 and 30253(5).[89]

6. Scenic Resources and Community Character Conclusion

The site is located within, and is a part of, a significant public viewshed. The proposed project would block and seriously degrade public coastal views. It would result in a structure that is unlike the existing character of development, not subordinate to the character of its setting, and one that is antithetical to the beach area aesthetic. The proposed project is inconsistent with the Coastal Act sections discussed in this finding.[90] Because of the site's viewshed location, the other site constraints, and the proposed design, there are not any feasible modifications to this project that could make it consistent with the Coastal Act in this regard.

C. Public Access and Recreation

1. Applicable Policies

Coastal Act Sections 30210 through 30214 and 30220 through 30224 specifically protect public access and recreation. In particular:

> ***Section 30210.*** *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*
>
> ***Section 30211.*** *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

---

89 And it is also inconsistent with the previously listed LCP policies, as well as LCP Policy 5.10.9 (requiring visual enhancement) and IP Section 13.20.130 requiring that development "be visually compatible and integrated with the character of the surrounding neighborhoods or areas" and sensitively designed "so that its presence is subordinate to the natural character of the site."

90 It is also inconsistent with the LCP, including the policies cited in this finding.

Section 30212(a): *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,(2) adequate access exists nearby, or, (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.*

Section 30213. *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. …*

Section 30220. *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

Section 30221. *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

Section 30223. *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

Coastal Act Section 30240(b) also protects parks and recreation areas. Section 30240(b) states, in applicable part:

Section 30240(b). *Development in areas adjacent to…parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those…recreation areas.*

2. LCP Policies

The County's LCP land use and zoning designations for the beach area (PR – Parks, Recreation and Open Space) protect this beach and back-beach area for recreational and open space use. Though zoned residential, the site's LUP land use designation is likewise Parks, Recreation and Open Space (or "O-R" pursuant to LCP Policy 7.10.1, that indicates that this designation is designed "to recognize existing public and private recreational uses"). The site is designated by the LCP's LUP as part of the 26th Avenue Beach regional park facility. LCP Policy 2.22.1 establishes a hierarchy of uses whereby coastal recreational use has priority over private residential use, and LCP Policy 2.22.2 prohibits the conversion of an existing priority use to a lesser priority use. Moreover, the LCP strongly protects this beach area from the intrusion of non-recreational structures and protects existing public access (for example LCP Objectives 7.7.a, 7.7.b, 7.7.c and Policies 7.7.4, 7.7.10, 7.7.11, 7.7.12 and LCP Zoning Code Section 13.20.130). The water quality of the Monterey Bay and Moran Lake are required to be protected and improved for, among other things, recreational use, through the use of appropriate BMPs (LCP Objectives and Policies 5.4 et seq, 5.7 et seq, and 7.23 et seq, and LCP Policies 2.23 et seq).

3. Current and Historical Public Recreational Use

As stated earlier, the project is located at the confluence of several significant public recreational access resources. The beach here is known as 26th Avenue Beach (and also known as Moran Lake Beach), and it is an extremely popular recreational beach, as well as a prime bodysurfing, skimboarding and surfing destination.[91] Moran Lake County Park is located just inland of East Cliff Drive from the project site, and supports beach and water use with public parking spaces, restrooms, showers, picnic tables, and other Park amenities. Even though the entire Live Oak beach area is heavily used by the public, the Moran Lake Park facility is one of only two beach-oriented recreational facilities, including a public beach parking lot, within coastal Live Oak (the other is located at "the Hook," at 41st Avenue, downcoast). As a result, use of this Park (and its significance in this regard) is intensified. The Park also includes a well used recreational trail that winds inland and around the lagoon providing both trail connections between 30th Avenue and East Cliff Drive, and providing opportunities for interpretation of the Lagoon and the Monarch butterfly over-wintering habitat area associated with the Park. East Cliff Drive is the first through public road, the primary lateral route through the Live Oak beach area, and it is used by a significant number of people (i.e., drivers, joggers, bicyclists, walkers, etc.) on an everyday basis.

In addition, and given that the project site is covered mostly by sandy beach and also includes a portion of East Cliff Drive on it (in the County easement), the project site itself is a part of this recreational use area. For many years, the public has used portions of the subject site for a variety of recreational access pursuits. These use patterns precipitated a formal prescriptive rights investigation by the Commission that is currently pending.[92] To date, over 50 affidavits have been submitted to the Commission that document years of public recreational use on the property, much of it everyday use. These documents indicate that at least some of the public has been under the impression that this property is public, and that some of the public has used it significantly as such for a variety of coastal recreational uses, including, but not limited to, parking cars, walking, sunbathing, viewing, picnicking, sitting, beach parties, beach clean-up, playing, biking, barbequing, etc.. The documents thus far submitted indicate that such public use of the property has been ongoing continuously and regularly since at least 1961 (although use was limited to the margins of the site for the 10 years when a home was present in the 1970s). The site is not posted to preclude any such access. This ongoing public use of the site occurs despite the fact that much of the beach portion of the site is occupied by scattered rip-rap and other fill materials. As of the date of this report, the prescriptive rights investigation is continuing, but the Commission has not yet considered whether to pursue such litigation at this location.

This continuing public access use also occurs even though an existing pole and metal-cable fence runs along the East Cliff Drive pavement that blocks and precludes a variety of access uses.[93] As previously indicated, both East Cliff Drive and the fence are located in an area of the property where the County

---

91 See also "Existing Conditions and Background" section earlier for additional detail on this point.

92 See also "Existing Conditions and Background" section of this report.

93 Again, as previously indicated, the Commission has been unable to locate a CDP for this fence, and an ongoing enforcement investigation is continuing. The County indicates that there is no encroachment permit authorizing such development in the easement area (as would be required).

owns an easement that runs along East Cliff Drive.[94] The easement is 17½-feet wide and this area is reserved "for all the purposes of a roadway and not otherwise." About half of this easement area is currently occupied by the existing paved roadway of East Cliff Drive. The other half (toward the ocean) is partially blocked by the fence that is located at the edge of the East Cliff Drive pavement (see photos in exhibit B). East Cliff Drive is very narrow at this location, with a minimal and sub-standard width bike lane, and no sidewalks. It is in acute need of roadway access improvements. If the fence were removed, additional area would be available within the public easement for the public to walk, ride bikes, park, etc.. Even minimal improvements in this area would enhance public access.

4. Effect of the Proposed Project on Public Recreational Access

The project would directly block existing public access, and it would degrade remaining public access areas that weren't blocked.

Direct Blockage of Public Recreational Access

The proposed project would directly block the ability of the public to use most of the site. The residential structure itself would occupy useable (and used) beach space, as would the majority of the hammerhead parking area and the remainder of the driveway/bridge. The driveway/bridge and associated development (i.e., large 3 and 4 foot in diameter rocks, plants, and trees) would also be placed in the public roadway easement blocking the ability of the public to use this portion of the road for public purposes. A County encroachment permit would be required to allow such development within the County easement.

In addition, during and following storm events, portions of the residential development below the upper floor (including the breakaway garage walls, any materials or cars stored in the garage, and the materials associated with the inland driveway/bridge area) would be expected to be littered across East Cliff Drive, into Moran Lake County Park, across the beach, and into the Monterey Bay (see the "Geologic Conditions and Hazards" section preceding for more detail on this point). As previously described, the degree to which such materials would be swept into the storm surge is a function of the severity of the storm.[95] These materials would also block the ability of the public to use these areas, and could result in damage to public facilities (such as the Moran Lake County Park trail just inland of the site opposite East Cliff Drive) should they be moved with enough force and/or in a severe enough storm event. Even during less significant events, not themselves capable of washing out the lower portion of the structure as designed, storm waters would be expected to move through the garage openings (previously described) and similarly result in materials distributed into these public areas similarly blocking public access.

The public recreational use of this immediate area and the subject site is significant. The proposed

---

94 By virtue of a 1964 court judgment. See also "Existing Conditions and Background" section earlier in this report.

95 Based on the historic storm event trends, and based on sea level rising, it is reasonable to presume that this site will be at risk from coastal flooding every year, with more severe storms leading to more significant flooding and damage every few years, and with the possibility that the historic "100-year storm" and the corresponding severe damage could occur multiple times throughout the coming century.

project would result in the direct loss of this area to the detriment of documented public recreational use. This is inconsistent with the Coastal Act. Specifically, the proposed project does not maximize public access, rather it reduces it contrary to Section 30210; it directly interferes with the public use of the above-described access areas contrary to the requirements of Section 30211; it does not provide access to and along the shoreline, rather it reduces its adequacy contrary to the requirements of Section 30212; it removes a no-cost access area from use contrary to Section 30213; the water-oriented recreational activities (like surfing, bodysurfing, skimboarding, playing in the surf, etc.) available at this location cannot be duplicated at inland locations, the coastal area of the site directly supports such activities, and the proposed project does not protect these coastal areas for such uses inconsistent with Section 30220; the site is suitable for recreational use as demonstrated by its long use in this capacity by the public for many years, and the proposed project does not protect it for such use contrary to Section 30221; the site is partially an upland area necessary to support the coastal recreational uses ongoing there, and the proposed project does not reserve it for that purpose contrary to Section 30223; and the project would significantly degrade these public use areas by removing a portion of them from use (where this is incompatible with their continued use for recreational purposes), and this is inconsistent with Section 30240(b).[96]

Degradation of Remaining (i.e., Not Blocked) Public Recreational Access

The beach and other recreational access areas provided at this location are a finite resource in the state, and particularly in the Live Oak beach area. Beach access in Live Oak has been hemmed in by a pattern of development that rings the shoreline with structures, and covers the beach with rip-rap antithetical to public recreational use.[97] Beaches that are supported by parking and restroom facilities like those at Moran Lake County Park are extremely rare. As discussed above, the proposed project would result in a reduction in the area available for public recreational access. It would also diminish the value of the remaining recreational public access area adjacent to and surrounding the site because this recreational use area would be reduced in scope (as detailed above), and it would introduce a large non-recreational structure into the middle of a significant public access area. This structure would impact public access views and detract from the character of the area (as discussed in the preceding section of this report), but that is but one part of the equation. It would also diminish the value of the overall recreational access experience. An imposing structure would loom over the beach and Moran Lake County Park, greeting beach, inland, nearshore, and offshore users with its facade as opposed to the present natural environment and perceived sense of openness. Because beach goers don't generally want to sit at the

[96] It is also inconsistent with the LCP for similar reasons. For example: it allows conversion of a higher priority coastal recreational use to a lower priority residential use when this is prohibited (LCP Policies 2.22.1 and 2.22.2); it does not maximize, maintain, or protect coastal recreational access (LCP Objectives 7.7.a, 7.7.b, and 7.7.c, and LCP Policies 7.7.10, 7.7.11, and 7.7.12); and it allows a permanent structure on the beach when this is prohibited (LCP Zoning Code Section 13.20.130). The latter requiring a previously identified (i.e., the twelfth that would be necessary to allow the proposed project) variance to LCP Zoning Code requirements. The use change inconsistency (of LCP Policies 2.22.1 and 2.22.2) could also be considered a required LCP variance. However, this assertion is less clear given the site's residential zoning (notwithstanding its parks and recreation use patterns and land use designation).

[97] For example, as described earlier, it has been estimated that over an acre of beach (and probably double that) at 26th Avenue Beach has been covered with rip-rap (1995 Monterey Bay ReCAP).

base of such looming structures,[98] that portion of the beach that would remain nearest the base of the residence would be "lost" to public access use (though physically present), thus further reducing beach recreational use areas. Because the residential structure is roughly 70 feet long along the upper floor beach elevation, and about 35 feet tall (as seen from the beach in front), this "reduced use" beach area translates into a rectangular beach area of about 5,000 square feet.[99] This is a significant reduction when the beach area is already limited to begin with.

In addition, the project does not include any measures to filter or treat runoff prior to its discharge from the site. The project would include increased impervious surface coverage, and new vehicular access areas across which runoff would flow. Runoff from the site would be expected to contain typical runoff elements associated with urban residential development, including vehicular use areas. Urban runoff is known to carry a wide range of pollutants including nutrients, sediments, trash and debris, heavy metals, pathogens, petroleum hydrocarbons, and synthetic organics (such as pesticides and herbicides).[100] Urban runoff can also alter the physical, chemical, and biological characteristics of water bodies to the detriment of aquatic and terrestrial organisms. Runoff that flows directly to the beach and the Monterey Bay will negatively impact near shore and offshore recreational use by contributing urban contaminants to this area.[101] This would both reduce beach access (because beach goers are becoming more sophisticated about avoiding polluted beach areas and waters, and better water quality data is available in this regard than historically) and adversely affect the access that continued notwithstanding these impacts.

Furthermore, during and following storm events that reached the garage floor and the bridge/driveway, the potential for typical materials stored and/or spilled in the garage, including vehicular residues, to be washed out of the garage is high. This will exacerbate water quality impacts on recreational use. Also, in more severe storm events, it is possible that the sewer connection from East Cliff Drive to the residence could be ruptured, leading to the potential for the escape of raw sewage onto the beach and into the Bay, again to the detriment of recreational users and public health.[102] In addition, as described earlier, ocean waters would be expected to extend under the garage perimeter beams at times and along the underside

---

98 Beach goers typically avoid sitting near residential structures such as this because they want to avoid a structure looming over the top of them and they also want to avoid sitting close to persons living in them (for the privacy of the beach goers and the privacy of the residents).

99 Presuming the area so affected is roughly as wide as the height of the structure looming over it (35 feet), and as long as the length of it (70 feet) where additional area to both sides of its facade must be added to this length total (35 feet added at either end). In other words, a rectangle of roughly 140 feet by 35 feet, or 4,900 square feet.

100 Pollutants of concern found in urban runoff include, but are not limited to: sediments; nutrients (nitrogen, phosphorous, etc.); pathogens (bacteria, viruses, etc.); oxygen demanding substances (plant debris, animal wastes, etc.); petroleum hydrocarbons (oil, grease, solvents, etc.); heavy metals (lead, zinc, cadmium, copper, etc.); toxic pollutants; floatables (litter, yard wastes, etc.); synthetic organics (pesticides, herbicides, PCBs, etc.); and physical changed parameters (freshwater, salinity, temperature, dissolved oxygen).

101 Unfortunately, this type of water quality impact has become a more common phenomena at urban beaches, particularly those with lagoon outlets, and several in Santa Cruz County have been permanently posted as dangerous for recreational use (e.g., Schwan lagoon outlet at Twin Lakes State Beach upcoast).

102 As previously described, the sewer connection details have not yet been determined, and thus the potential for this impact is unclear at this point. See also "Geologic Conditions and Hazards" section of this report preceding, and "Marine Resources and Habitat" section that follows.

of the concrete planks, pushing through any openings, re-suspending any materials on the garage floor and/or stored there. This would occur during non-storm times simply due to normal tidal action. In larger events, the planks/beams forming the floor themselves would be pushed loose. In all cases, leading to the same types of detrimental impacts identified above.

Moreover, the cavity created underneath the perimeter beams and the concrete planks of the garage floor, and to a lesser extent the bridge at the driveway (if necessary), would provide an attractive habitat for rodents. Structures along the immediate shoreline with air-pocket voids such as this (for example, this is a common design phenomenon with revetments), are known to harbor rats. This safe haven for rodents is particularly the case for such structures fronting popular beach areas (due to visitors' food and garbage). In the Live Oak area of Santa Cruz County, this type of rodent infestation is quite common. Such rodents negatively impact the beach recreational experience, and can lead to serious water quality and other public health problems.[103] Rodents have historically been present in structures surrounding the site at 26th Avenue Beach, although it is not known whether they are still present. It is reasonable to presume that the cavities created below the structure would increase habitat for such pests to the detriment of beach goers.

As with direct blockage discussion above, the proposed project is also inconsistent in these ways with the Coastal Act. Again, it minimizes as opposed to maximizes public access (Section 30210); it interferes with existing public access (Section 30211); it reduces the access presently provided that would be more appropriately increased (Section 30212); it does not protect no-cost access (Section 30213); it does not protect coastal areas suited for ocean-specific water-oriented recreational activities (Section 30220); it does not protect suitable oceanfront land for recreational use (Section 30221); it does not protect an upland area necessary to support coastal recreational uses (Section 30223); it would significantly degrade the existing park and recreational areas (Section 30240(b)); and it would also both reduce and negatively impact beach, nearshore, and offshore recreational use from its runoff (inconsistent again with the provisions of Sections 30210, 30211, 30213, 30220, 30221, 30223, and 30240(b)).[104]

5. Public Access and Recreation Conclusion

The project site is located within, and indeed is a part of, a significant public recreational access area. This includes the beach, nearshore surfing, bodysurfing, and skimboarding areas, Moran Lake County Park, and East Cliff Drive. The proposed project would directly block existing recreational access use by the public, and would seriously degrade the surrounding recreational public access areas that aren't blocked. It would result in a structure that would loom over the beach, the nearshore, the Park, and East Cliff Drive and diminish the recreational value of these resources. The proposed project is inconsistent with the Coastal Act sections discussed in this finding.[105] Because of the site's location relative to the

[103] The Commission has taken to regularly requiring pest control action with immediate shoreline development. Most recently, in January 2004, this requirement was incorporated into the Commission-approved repair CDP for the bluff area seaward of the immediately adjacent upcoast residence (CDP 3-03-016, Lang)

[104] It is also inconsistent with the LCP for similar reasons, and as detailed in the preceding finding.

[105] It is also inconsistent with the LCP, including the policies cited in this finding.

public recreational access use areas, and the other site constraints, there are not any feasible project modifications that could make the project consistent with the Coastal Act in this regard.

D. Marine Resources and Habitat (ESHAs)

1. Applicable Policies

The Coastal Act is very protective of sensitive resource systems such as wetlands and other environmentally sensitive habitat areas (ESHAs). Section 30107.5 of the Coastal Act defines environmentally sensitive areas as follows:

> ***Section 30107.5.*** *"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

Almost all development within ESHAs is prohibited, and adjacent development must be sited and designed so as to maintain the productivity of such natural systems. In particular, Coastal Act Section 30240 states:

> ***Section 30240(a).*** *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
>
> ***Section 30240(b).*** *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

As previously cited, Chapter 3 of the Coastal Act also describes protective policies for the marine environment. Coastal Act Sections 30230 and 30231 provide:

> ***Section 30230.*** *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*
>
> ***Section 30231.*** *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation*

buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

In sum, the Coastal Act requires protection and preservation of significant habitat resources such as exist adjacent to the project site.

2. LCP Policies

The LCP designates Moran Lake as both Sensitive Habitat and ESHA as that term is understood within a Coastal Act context (LUP Policy 5.1.2(i) and 5.1.3, IP Chapter 16.32). The LCP requires that development be set back a minimum of 100 feet from the Lake as measured from its high water mark (IP Section 16.32.090(A)(11)) and designates this 100 foot area as a riparian corridor (LUP Policy 5.2.1 and IP Chapter 16.30) to which an additional 10 foot setback is required (LUP Policy 5.2.4); a total required minimum setback area of 110 feet. Riparian corridors are also designated as both Sensitive Habitat and ESHA by the LCP (LUP Policy 5.1.2(j) and 5.1.3, IP Chapter 16.32) within which development is generally prohibited (IP Section 16.30.040 and IP Chapter 16.32). Exceptions to setback requirements are only allowed under very limited circumstances, and are subject to making specific exception findings (IP Sections 16.30.060 and 16.32.100). The LCP indicates that development of riparian corridors should be avoided "to the greatest extent allowed by law" (LUP 5.2 Program a).

ESHA and Sensitive Habitat are to be preserved, restored, protected against significant disruptions, and any development authorized in or adjacent to them must maintain or enhance the habitat (LCP Objectives and Policies 5.1 et seq and 5.2 et seq, IP Chapters 16.30 and 16.32). The quality of Moran Lake and the Monterey Bay waters is required to be protected and improved through the use of appropriate BMPs (LCP Objectives and Policies 5.4 et seq, 5.7 et seq, and 7.23 et seq, and LCP Policies 2.23 et seq).

In sum, and like the Coastal Act, the LCP requires maximum protection for habitat resources.

3. Resources at this Location

As previously detailed, the site is located adjacent to Moran Lake (see exhibit A). Moran Lake proper is an estuarine lagoon system that has long been mostly blocked from the Monterey Bay due to the presence of the East Cliff Drive fill which generally acts as a dam. The box culvert just upcoast of the site allows for some interaction between the Lake and the ocean, but generally only during periods of higher tides and surf. As a result of this disconnect, encroaching urbanization and its attendant impacts (i.e., increased polluted runoff and sedimentation; increased noise, lights, activities, floatable pollutant and debris; domestic animal predators; vegetation removal; etc.), rapidly expanding invasive exotics (such as iceplant); and lack of funding with which to manage, restore and enhance the Park, the Moran Lake wetland habitat is currently less than optimal. Nonetheless, Moran Lake and its environs remain an important natural area where options for restoring this habitat exist, and it remains a valuable wetland system considered ESHA by the Coastal Act.[106]

[106] The County recently prepared a management plan for Moran Lake County Park, and intends to pursue implementation of it as funding allows.

In addition, Moran Lake County Park also includes an important Monarch butterfly over-wintering habitat area. Such over-wintering habitats are narrowly distributed in California and are relatively rare; they have been described as the "Achilles' heel" of the monarch migratory phenomenon.[107] The Moran Lake monarch over-winter roosting habitat is located approximately ¼ mile inland (to the north) of the subject site. This primary inland habitat area essentially surrounds the County's Lode Street Sanitation Facility and extends partially to the south from this area; the habitat is almost exclusively made up of blue-gum eucalyptus trees. The trees just opposite East Cliff Drive from the project site act as a wind screen for the inland primary habitat area. The Moran Lake over-wintering habitat has been identified as the second largest (after Natural Bridges State Park in the City of Santa Cruz upcoast) monarch butterfly colony in Santa Cruz County, supporting an average of 40,000 butterflies every winter. This over-wintering habitat at Moran Lake is likewise considered ESHA by the Act.

Finally, and perhaps most obvious, the Monterey Bay National Marine Sanctuary is located directly offshore of the site. The Sanctuary is home to some 26 Federal and State Endangered and Threatened species and a vast diversity of other marine organisms. The Commission generally considers Sanctuary waters to be ESHA, much as wetlands are oftentimes categorically defined as ESHA.

In sum, the site is bordered by Moran Lake (both inland of East Cliff and also seaward of East Cliff at the adjacent box culvert) and the Monterey Bay National Marine Sanctuary. It is also located near significant over-wintering habitat for monarch butterflies. Thus, although the site itself does not appear to support sensitive habitat,[108] the Commission recognizes the surrounding habitat and marine resource areas as sensitive coastal resources that are of high state and federal importance.

4. Water Quality Impacts

As described in the previous finding, the project does not include any measures to filter or treat runoff prior to its discharge from the site (see also the "Public Access and Recreation" section preceding this one). The project would include increased impervious surface coverage, and new vehicular access areas across which runoff would flow. Runoff from the site would be expected to contain typical runoff elements associated with urban residential development, including vehicular use areas. Urban runoff is known to carry a wide range of pollutants including nutrients, sediments, trash and debris, heavy metals, pathogens, petroleum hydrocarbons, and synthetic organics (such as pesticides and herbicides).[109] Urban runoff can also alter the physical, chemical, and biological characteristics of water bodies to the

---

[107] Monarchs repeatedly search out specific micro-climates based on the interaction of temperature and wind, preferably in close proximity to food sources. These monarch micro-climate sites are generally classified on the basis of how they are used by the butterflies: those sites that are used for only the first part of the winter migration (i.e., September/October through November) being known as "autumnal roost sites," while those used for all or part of the winter (due to preferred micro-climatic conditions) being known as "over-wintering sites." Further breaking this down, there will be different roosting locations within an over-wintering "site" over the course of a winter as the butterflies respond to prevailing wind and temperature variations within any one site.

[108] With the caveat that the site historically appears to have been a part of the lagoon, and historically was not covered with scattered rip-rap and fill, but rather lagoon historically and beach dune sands and plants in more recent times. These resource values, which could be considered ESHA, could return if some of the rip-rap and fill were removed. More likely, however, given its location in the middle of a intensive public use area (as described in the previous section), significant habitat values would not return in such a scenario. Rather, the area would return to more typical beach access use.

[109] Ibid.

detriment of aquatic and terrestrial organisms. Runoff that flows directly to the beach and the Monterey Bay is expected to negatively impact Moran Lake and Monterey Bay resources.

Furthermore, during a major storm (or even a less significant storm that washed through the garage area), the potential for typical materials stored and/or spilled in the garage, including vehicular residues, to be washed out of the garage is high. In addition, as described earlier, ocean waters would be expected to extend under the garage perimeter beams at times and along the underside of the concrete plank/beam flooring, pushing through any openings, re-suspending any materials on the garage floor and/or stored there. In larger events, pushing the planks/beams themselves loose. In all cases, leading to the same types of detrimental impacts identified above. This will exacerbate water quality impacts. Also, in more severe storm events, it is possible that the sewer connection from East Cliff Drive to the residence could be ruptured, leading to the potential for the escape of raw sewage into adjacent marine and lagoon areas, again to the detriment of marine resources and habitat.[110] Debris from the "disposable" portion of the development would also result in water quality degradation when the site and residential main structure was flooded.[111] Such impacts would be at the expense of wetland habitat and one of the state and nation's great treasures, the Monterey Bay. The project is inconsistent with Coastal Act Sections 30230, 30231, and 30240 in this regard.

5. Other ESHA Impacts

In addition to direct water quality impacts discussed above, the proposed project would also introduce a large residential structure within about 25 feet of Moran Lake (where it pools on the seaward side of East Cliff Drive), and within about 75 feet of Moran Lake on the inland side.[112] The intrusion to within 25 feet or so of Lake resources on the seaward side of East Cliff Drive would be expected to have a relatively minor impact on Lake resources because this area is already heavily used by beach goers, is unvegetated, and attracts little wildlife.

To a different degree, the Moran Lake area inland is also already impacted by use and activity along East Cliff Drive and the Moran Lake path system, and is primarily surrounded otherwise by residential development. Thus, during the day, the addition of the proposed project would likely have little direct impact on habitat values within this inland area because of the amount of use surrounding Moran Lake at that time (and the overall amount of existing noise, lights, and visible activity filtering into this area). That said, this inland area differs from the area seaward in terms of wildlife use, and is a more significant habitat. At night, the additional noise, lights, and increased activities associated with the proposed project (elevated mostly in the air at the upper level of the proposed structure where it is more

---

110 As previously described, the sewer connection details have not yet been determined, and thus the potential for this impact is unclear at this point. See also "Geologic Conditions and Hazards" section of this report preceding, and "Marine Resources and Habitat" section that follows.

111 See also "Geologic Conditions and Hazards" section of this report for additional detailed description of expected storm occurrences and potential damages.

112 Because it is located within the LCP required 110 foot setback, this is the thirteenth variance to LCP Zoning Code requirements that would be necessary to allow the proposed project.

obvious to inland receptors in the habitat area), would be expected to have a negative effect on nocturnal habitat use. However, this impact is difficult to isolate, and more difficult to quantify. Given the degree of existing development, its impact would appear to be minor in this regard.

Likewise, the structure would be placed within an area that the wind currently blows through unencumbered, both on and offshore. Changes in wind dynamics at a Monarch butterfly habitat site can have significant detrimental effects. Among other things, Monarchs are extremely sensitive to changes in wind, and changing the historic wind pattern at known over-wintering locations can lead to loss of habitat. Again, the effect of this project on wind dynamics, and in turn in Monarch habitat, is difficult to isolate and quantify. Given that the main habitat area is about ¼ of a mile inland, and is separated from the subject site by existing vegetation and trees, the project is unlikely to significantly disrupt the Monarch habitat.

More importantly, the proposed landscape plan for the project includes a series of non-native and invasive plant species (as detailed previously). Such non-native invasive plants can invade native habitat areas and can vastly alter the ecological landscape by out-competing and excluding native plants and wildlife; altering nutrient cycles, hydrology, and hybridizing. This is particularly critical since the site is adjacent to Moran Lake County Park, and such species can easily jump the road (windblown, animal borne, storm borne) to reproduce. The most effective and efficient way to deal with weedy non-native species is to prevent invasions. Preventing invasion is of greater conservation benefit in the long run than the far more costly and difficult efforts to control a widespread pest species. The proposed project is inconsistent with Coastal Act Section 30240 in this regard, because it would be expected to encourage and lead to this type of exotic pest infestation into the natural area of the Park. The Park is hardly pristine in terms of such species infestation, but new projects should not add to this problem, and make it more difficult to fix in the future.

6. Marine Resources and Habitat Conclusion

The project site is surrounded by Moran Lake inland and sometimes seaward of East Cliff Drive, and the Monterey Bay National Marine Sanctuary on its seaward side. The project would result in additional impervious surfacing, and has not proposed any mechanism to filter or treat runoff from such surfaces. As a result, pollutants would be expected to wash from the developed portions of the site onto the beach (and eventually into Moran Lake and Monterey Bay). Furthermore, during storm events, and in addition to other polluted runoff, the potential for typical materials stored in a garage (such as paints, varnishes, solvents, etc.) to wash into adjacent areas is high, resulting in nutrients, sediments, trash and debris, heavy metals, pathogens, petroleum hydrocarbons, and synthetic organics being introduced into these environments in a more concentrated form. Even a less significant events that washed through the garage area would result in increased pollutant loading. A severe storm event might result in a ruptured sewer connection (and result in raw sewage escaping into the environment) depending on the details of the sewer connection (not yet established). In addition, the exotic pest plant species proposed would be expected to degrade the inland natural area. All of these impacts due to the project would be detrimental to Moran Lake and Monterey Bay resources. The proposed project is inconsistent with Coastal Act

Sections 30230, 30231, and 30240 as discussed in this finding.[113]

Unlike previous Coastal Act inconsistencies identified, native plant species could be required, and some water quality measures could be added to the project to filter and treat typical runoff coming from the developed portions of the site. However, measures designed to make sure that portions of project do not come apart in a storm event and measures designed to prohibit storage of materials in the garage (or to secure materials in the garage) would lead to different Coastal Act and LCP inconsistencies (such as requiring armoring to protect new development, degradation of the beach viewshed, hindering flood flows, requirements for on-site parking, etc.). Because of this, and the other site constraints, there are not feasible project modifications that could make the project consistent with the Coastal Act in this regard.

E. Cumulative Impacts

Coastal Act Section 30250(a) addresses cumulative impacts, stating in part as follows:

> ***Section 30250(a).*** *New residential, commercial, or industrial development…shall be located…where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. …*

The LCP includes a similar cumulative impacts policy, requiring that development not adversely affect, individually or cumulatively, coastal resources (LCP Policy 2.1.4); including the coastal resources thus far discussed in these findings. As discussed in the preceding findings, the proposed project individually has significant adverse effects on coastal resources. As such, it is inconsistent with Coastal Act Section 30250(a).[114]

In terms of cumulative impacts, it has become common practice to contend that the impacts of individual projects are negligible because the development being proposed is small in relation to the coastline, or its impacts individually can be addressed in some manner. This phenomenon has been described as the 'tyranny of small decisions' as summarized by Gary Griggs, James Pepper and Martha Jordan (*California's Coastal Hazards: A Critical Assessment of Existing Land-Use Policies and Practices*). In it they observe:

> *[decisions to approve projects] are usually made on a project-by-project basis, they tend to be evaluated independently, without any systematic consideration of the aggregate or cumulative effects either within or among jurisdictions. Within such a decision-making context any given project can be viewed as small and thus easy to rationalize in terms of approval. Cairns (1986) calls this endemic failure to take into account the aggregate effects of environmental management 'the tyranny of small decisions.'*

In this case, the proposed project's contribution to cumulative adverse resource impacts is less clearly identified than its individual contribution. It is clear that the current pattern of development in coastal

[113] It is also inconsistent with the LCP, including the policies cited in this finding.

[114] It is also inconsistent with LCP Policy 2.1.4 in terms of individual adverse effects.

Live Oak has resulted in a fairly developed immediate shoreline where through coastal views from the first public road are rare. Sandy beach area available for public access and recreation is slowly being reduced due to passive erosion. In this context, the proposed project adds incrementally to these coastal resource impacts by further reducing available views and further reducing available beach access. In that sense, it contributes to the cumulative coastal resources impacts in this area. The degree of the proposed project's contribution in this regard is, however, difficult to measure.

Another way the proposed project could have a cumulative impact is to encourage similar proposals for beach development (with similar issues and impacts). In other words, if a project like this were to go forward, it could lead to similar proposals for development on beach areas by virtue of the perception that such development was deemed appropriate or allowable. For example, the Commission is aware of at least two similar proposals for residential development on sandy beach in Santa Cruz County; one of these is on the beach seaward of Corcoran Lagoon immediately upcoast. It is not clear, however, to what extent this project could result in such future projects coming to fruition, nor is it clear to what extent such a scenario can be reasonably attributed to this project.

In sum, there are some reasons that it can be said that the proposed project results in cumulative adverse resource impacts, but these grounds do not clearly prove there to be cumulative impacts. That said, the proposed project is inconsistent with Section 30250 because it individually results in adverse coastal resource impacts

F. CDP Determination Conclusion - Denial

1. Denial

As discussed in the above findings, the proposed project is inconsistent with the policies of the Coastal Act, as well as the LCP. When the Commission reviews a proposed project that is inconsistent with the Coastal Act, there are several options available to the Commission. In many cases, the Commission will approve the project but impose reasonable terms and conditions to bring the project into conformance with the Coastal Act. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission will deny the project and provide guidance to the applicant on the type of development changes that must be made for Coastal Act conformance. These denials are without prejudice inasmuch as applicants are given direction on what they need to do to propose an alternative project that can meet Coastal Act policies. In rare cases, there are no feasible conditions that could bring the project into conformance with the Coastal Act, and there are no obvious feasible alternatives consistent with the Coastal Act that the Commission might suggest to an applicant. When this happens, the Commission will deny the project without further guidance to the applicant.

In this case, the proposed project is significantly out of conformance with the Coastal Act because the entire project site is unstable, unsafe, extremely visible, and is located in the middle of a significant public recreational access area adjacent to ESHA inland and the Monterey Bay. As a result, the

proposed project must be denied, and the Commission is unaware of any modifications that could make a residential structure at this site consistent with the Coastal Act. This denial, however, does not preclude the Applicant from applying for some other development or use of the site, such as some minor extension or more useable configuration of the deck from the adjacent parcel or the placement of additional shoreline armoring (e.g., like the rip-rap already permitted) to protect the house on the adjacent lot.

2. Takings

When the Commission denies a project, a question may arise whether the denial results in an unconstitutional "taking" of the applicant's property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

> *The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the assurance that its actions are consistent with Section 30010. If the Commission concludes that its action might constitute a taking, then Section 30010 requires the Commission to approve some level of development, even if the development is otherwise inconsistent with Coastal Act policies. In this latter situation, the Commission will propose modifications to the development to minimize its Coastal Act inconsistencies while still allowing some reasonable amount of development.[115]

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, its denial of the project would constitute a taking. The Commission finds that, under any of the prevailing takings tests, the denial of the project would not constitute a taking.

General Takings Principles

The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."[116] Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just

[115] For example, in CDP A-3-SCO-00-033 (Hinman), the Commission in 2000 approved residential development on a site that was entirely ESHA even though it was not resource dependent development and thus was inconsistent with the LCP (which was the standard of review in that case).

[116] The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

compensation…has first been paid to, or into court for, the owner."

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee, supra,* 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). The Commission's actions here would be evaluated under the standards for a regulatory taking.

The Supreme Court itself has recognized that case law offers little insight into when, and under what circumstances, a given regulation may be seen as going "too far" (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014). In its recent takings cases, however, the Court has identified two circumstances in which a regulatory taking might occur. The first is the "categorical" formulation identified in *Lucas, supra.* In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved (*Id*. at p. 1014). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" or rendered it "valueless" (*Id.* at pp. 1016-1017 [emphasis in original]) (see *Riverside Bayview Homes, supra,* 474 U.S. at p. 126 [regulatory takings occur only under "extreme circumstances"]).[117]

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co.* (*Penn Central*) v. *New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations (*Id*. at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *id.* [rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*]).[118]

---

[117] Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra,* 505 U.S. at pp. 1028-1036).

[118] The courts have mentioned a third standard – whether a regulation "substantially advances" a legitimate government interest. This "means/ends" formulation has been applied mostly in cases testing the legality of actions in which government exacts property or fees as a condition for approving development (see *San Remo Hotel L.P. v. City and County of San Francisco* (Mar. 4, 2002) 2002 Lexis 623, 37-60; *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 776). The United States Supreme Court itself has never applied this standard in a regulatory takings case (Cf. *City of Monterey v. Del Monte Dunes, Ltd.* (1999) 526 U.S. 687, 694, 704 [Court

Before a Landowner May Establish a Taking, Government Must Have Made a Final Determination Concerning the Use to Which the Property May Be Put

Before a landowner may seek to establish a taking under either the Lucas or Penn Central formulations, however, it must demonstrate that the taking claim is "ripe" for review. This means that the takings claimant must show that government has made a "final and authoritative" decision about the use of the property (e.g., *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Premature adjudication of a takings claim is highly disfavored, and the Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it" (*Id.* at p. 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (e.g., *McDonald, supra*).

In this case, although the Commission has denied the proposed residential structure, the Commission's denial does not preclude the Applicant from applying for some other use on the site, such as some minor extension or more useable configuration of the deck from the adjacent parcel or the placement of additional shoreline armoring (e.g., like the rip-rap already permitted) to protect the house on the adjacent lot. The Applicant also remains free to explore whether a temporary visitor serving development at the site might provide him some additional use of the property. In these circumstances, it cannot be said that the Commission has made a final and authoritative decision about the use of the project site. Therefore, the Commission's denial cannot be a taking because a taking claim is not "ripe."

Even if the Taking Claim Were Ripe, the Commission's Action Would Not Constitute a Taking

As a threshold matter, before a taking claim can be analyzed it is necessary to define the parcel of property against which the taking claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable parcel of property on which development is proposed. The issue is complicated in cases where the landowner owns or controls adjacent or contiguous parcels that are related to the proposed development. In these circumstances, courts will analyze whether the lots are sufficiently related so that they can be aggregated as a single parcel for takings purposes. In determining whether lots should be aggregated, courts have looked to a number of factors such as unity of ownership, the degree of contiguity, the dates of acquisition and the extent to which the parcel has been treated as a single unit (e.g., *District Intown Properties, Ltd. v. District of Columbia* (D.C.Cir.1999) 198 F.3d 874, 879-880 [nine individual lots treated as single parcel for takings purposes]; *Ciampitti v. United States* (Cl.Ct. 1991) 22 Cl.Ct. 310, 318).

Applying these factors, the Commission concludes that the property to be analyzed for takings purpose is a single parcel that comprises the lot on which the project is proposed (APN 028-481-03) and the adjacent lot on which Applicant's existing residence is located (APN 028-481-04). There are many reasons to support this. First, both parcels are owned by the Applicant and were acquired at the same

---

declines to decide applicability of standard where City failed to object to jury instruction]). The Court ignored the standard in its *Palazzolo* decision, and several years ago five members of the Court rejected its application to a regulatory takings case (see *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, 545, 546 [conc. in judg. & dis. opn. of Kennedy, J.]; *id.* at 554 [dis. opn. of Breyer, J.]).

time in 1998. Second, the Applicant purchased both lots and the existing house for a single purchase price, and the parties to the sale did not assign separate values or purchase prices to the two lots. Third, the two lots are contiguous, framed by East Cliff Drive inland and the beach seaward, and are subject to the same local land use designation (O-R, Parks, Recreation, and Open Space) and zoning (R-1). Fourth, the Applicant has treated the two lots as a single unit. This is strongly evidenced by the fact that the deck, concrete beach access stairway (extending seaward from the deck), rope and pole fence (at the rip-rap edge) and landscaping connected to the house on APN 028-481-04 extends onto APN 028-481-03, and by the fact that past owners of APN 028-481-04, including the current Applicant, have continually used APN 028-481-03 for the placement of rock rip-rap to protect the existing residence on APN 028-481-04.[119] The Applicant's engineer indicates that the armoring on APN 028-481-03 is required to maintain protection of the existing residence on APN 028-481-04 (due to the fact that the existing residence is at a low elevation, about +17 NGVD), and that without the rip rap on this parcel, the existing house on the adjacent parcel would be in peril from wave action during winter.[120] Finally, the deck, beach stairway, landscaping, and rip-rap on APN 028-481-03 significantly enhance the value of the house located on APN 028-481-04, further demonstrating the integral relationship between the lots (see annotated site plan details on page 4 of exhibit G). In these circumstances, the fact that the lots were separately owned for a 20-year period between 1971-1991 does not change the conclusion that the lots should be treated as a single integrated parcel, particularly because the lots have been functionally reunified since the house was demolished in 1983 and have been returned to common ownership since 1991.

In summary on this point, the takings doctrine treats APN 028-481-03 and APN 028-481-04 as a single parcel for the purpose of determining whether a taking occurred. Because this single parcel contains a residential structure and provides the Applicant substantial use of the entire parcel, the Commission's denial of a second house on the parcel is not a taking. Nevertheless, even if the subject lot APN 028-481-03 is treated as a separate parcel of property for takings purposes, the Commission's project denial would not constitute a taking under any formulation of the takings doctrine. This analysis follows.

The Denial of the Project Would Not Constitute a Categorical Taking

As discussed, the first test is whether there has been a categorical taking of property under the *Lucas* standards. To constitute a categorical taking, the regulation must deny all economically viable use of property; in other words, it must render the property "valueless" (*Lucas, supra,* 505 U.S. at p. 1012). If the property retains any value following the Government's action, the *Lucas* categorical taking formulation is unavailable and the property owner must establish a taking under the three-part Penn Central test (see *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 330; *Palazollo, supra,* 533 U.S. at pp. 630-632). Because permit decisions rarely render property "valueless," courts seldom find that permit decisions constitute takings under the *Lucas* standard.

---

[119] For example, coastal and emergency permits 3-81-063 (Formico and Poco), 3-83-051-G (Formico), 3-97-002-G (Formico), 3-97-005-DM (Williams), 3-03-001-G (Williams), and 3-03-024 (Williams).

[120] HKA 2000b and November 20, 2003 letter submitted on behalf of the Applicant (stating that, in the opinion of the Applicant's engineer, without the rip rap on this parcel the existing house on the adjacent parcel would be in peril from wave action during winter).

In this case, the relevant parcel (including both lots) contains an existing beachfront single-family residence and associated development. That makes the property extremely valuable even after the denial of this project, and there is no categorical taking.

Even if only APN 028-481-03 were considered as the relevant parcel for takings purposes, there is no categorical taking. As discussed at greater length in the following section, APN 028-481-03 by itself did not have significant economic value even before the Commission's decision. Whatever value it had was primarily based on its use for the extension of the Applicant's existing deck on APN 028-481-04, for the beach access stairway providing access to the beach from the deck on APN 028-481-04, for the rope and pole fence and landscaping buffering the deck and use areas on APN 028-481-04 from the rip-rap and the beach, for the placement of riprap to protect the existing house on APN 028-481-04, and for recreation and open space by the Applicant. After the Commission's denial, APN 028-481-03 remains available for all these valuable uses: (1) the extension of the existing ocean- and beachfront deck onto APN 028-481-03 provides unimpeded, open air, panoramic ocean and beach views, includes a concrete beach access stairway, and only a very small percentage of residences in coastal Live Oak enjoy such features; (2) the landscaping and pole and rope fence (at the rip-rap's edge) on APN 028-481-03 buffer the residence and rear use areas of the existing house; (3) the shoreline armoring on APN 028-481-03 protects the existing house on APN 028-481-04, without which the existing house would have been damaged over the years by storms and coastal erosion; and (4) the Applicant may use the undeveloped portions of APN 028-481-03 for its unimpeded coastal views, for recreation and as a buffer from his neighbors and the public. All of these uses have economic value to the Applicant, either alone or in conjunction with his enjoyment of the existing structure on his adjacent lot.

Therefore, the Commission's denial of a residential structure left the Applicant with significant uses, all of which have economic value to the Applicant, for which the Applicant would (and did) pay valuable consideration. Moreover, as will be addressed further, the Commission's denial did not significantly diminish the value of APN 028-481-03, which had little fair market value even before the Applicant acquired it. In these circumstances, the Commission's denial did not render APN 028-481-03 valueless and does not constitute a categorical taking under *Lucas.*

The Denial of the Permit is Not a Taking Under the Ad Hoc *Penn Central* Test

If a regulatory decision does not constitute a taking under *Lucas*, a court may consider whether the permit decision would constitute a taking under the ad hoc inquiry stated in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123-125. This ad hoc inquiry generally requires an examination into factors such as the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations. When applied to the facts of this case, each of these factors demonstrates that the Commission's denial is not a taking.

Reasonable Investment-Backed Expectations. This absence of reasonable investment-backed expectations is usually dispositive of a taking claim under the *Penn Central* standards (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005, 1008-1009). In this case, the Applicant's proposal to construct a residential structure on APN 028-481-03 was neither a reasonable expectation nor an investment-backed expectation.

In order to determine whether the Applicant had an investment-backed expectation to construct an additional house on APN 028-481-03, it is necessary to assess what the Applicant invested when he purchased that lot. The Applicant purchased both APN 028-481-03 and APN 028-481-04 (with the residential structure) for a single purchase price of $675,000; the sale did not ascribe an individual value to APN 028-481-03. At the time of the purchase, however, the County Assessor's office classified APN 028-481-03 as "wasteland" and calculated its value at $10,000. The Assessor valued APN 028-481-04 (with the existing residence) at $665,000, with $535,000 of that assigned to the value of the underlying land. The evidence suggests that these assessed values fairly reflected the relative values of the two properties.

One reasonable way of approximating how much of the purchase price should be attributed to each of the two lots is to first determine the value of APN 028-481-04, which is a beachfront house for which there are comparable houses from which to estimate its fair market value. Once that amount is determined, it can be subtracted from the entire purchase price to estimate the residual value of APN 028-481-03. In an attempt to better understand the going rate for immediate shoreline real estate at the site, the Commission examined the single-family home sales prices for sales of homes along the immediate shoreline located at 26th Avenue Beach (between Corcoran Lagoon and Soquel Point) over the past ten years. See table that follows:

SFD sales[1]		**Average and median sales prices in Santa Cruz County at the time of the SFD sale[2]**		**Premium amount paid compared to average and median sales at the time of the SFD sale**	
Sales date	**Sales price**	**Average price**	**Median price**	**% of average**	**% of median**
11/19/03	$1,600,000	$598,116	$533,000	268%	300%
10/21/03	$1,700,000	$609,384	$544,000	279%	313%
6/26/03	$2,300,000	$642,100	$550,000	358%	418%
3/7/03	$2,000,000	$578,549	$522,500	346%	383%
11/21/02	$2,343,000	$565,923	$510,000	414%	459%
8/24/01	$2,000,000	$560,991	$470,000	357%	426%
8/14/01	$2,500,000	$560,991	$470,000	446%	532%
10/4/00	$6,350,000	$541,083	$459,000	1174%	1383%
1/4/00	$1,360,000	$449,758	$370,000	302%	368%
11/6/98[3]	$675,000	$330,611	$295,000	204%	229%
7/10/98	$1,200,000	$350,237	$321,000	343%	374%
8/20/97	$995,000	$310,331	$265,550	321%	375%
2/7/97	$643,500	$293,950	$244,000	219%	264%
8/27/96	$888,000	$263,996	$245,000	336%	362%

Average:	**$1,896,750**	**N/A**	**N/A**	**383%**	**442%**

1. Source: Santa Cruz County Assessor's Office Transaction Database
2. Source: Santa Cruz Association of Realtors 1996-2003 Single Family Residential Statistics
3. Applicant's 1998 purchase of APNs 028-481-03 and 028-481-04 and all associated development on them

There were fourteen single-family residences that sold along the immediate shoreline fronting 26th Avenue Beach in the past ten years. All except one of these sales exceeded the Applicant's purchase price. On average, these oceanfront homes sold for nearly four times the average (383%), and more than four times the median (442%) of all homes sold in the County. Such premiums (above County averages) paid for shoreline real estate are common. Of the fourteen sales in the sample, the Applicant's was the lowest premium amount paid above the Countywide average and median at the time.

Therefore, when the Applicant purchased the two parcels and the residence together in 1998, it is reasonable to conclude that he paid no more (if not less) than fair market value for a *single* beachfront house in Santa Cruz County on a *single* beachfront lot. That leaves little value to be attributed to APN 028-481-03. This is particularly true because the primary value of beachfront property is in the land, not the structure. For example, the sales prices of vacant single family residential shorefront properties in the same sample area over the past 25 years have ranged from $475,000 in 1999 to $1.3 million in 2001.[121] Had the real estate market perceived APN 028-481-03 as vacant beachfront property that could be developed with a single family residence, the purchase price for the Applicant's two lots and one house would have been far greater, perhaps as much as double what he actually paid.

There is even more evidence that APN 028-481-03 is and was worth little more than $10,000. In 1989, when APN 028-481-03 was last separately acquired, the sales price was $10,000. At that time APN 028-481-03 already was developed with the deck and shoreline armoring that supports the adjacent lot.[122] In addition, the Applicant has continued to pay taxes on APN 028-481-03 based on this low value (currently $10,824) and pays taxes on APN 028-481-04 based on a much higher value (i.e., the land alone on APN 028-481-04 is currently valued at $579,101)

Therefore, it is reasonable to conclude that the Applicant's investment in APN 028-481-03 was approximately the $10,000 value that was assigned by the County Assessor. It is unlikely that a reasonable prudent buyer would have paid much more for this lot. Among other things, it was very small in size, it had enormous physical and economic constraints to development as evidenced by the house that was destroyed in 1983, it was burdened with a deck and rip-rap that supported the house on the adjacent lot, it would face serious scrutiny in the regulatory process, and it was subject to possible claims of prescriptive rights. Although APN 028-481-03 may have some additional value to the Applicant because it supports his house on the adjacent property, the taking doctrine look to impacts on fair market value, not the values unique to the landowner. Consequently, the Applicant did not have an

[121] There were five sales of vacant property along this stretch. Because two properties were sold twice, there were three vacant parcels involved in these sales. In chronological order, the sales consisted of: $500,000 for a 5,078 square foot parcel in 1989, $475,000 for a 3,562 square foot parcel in 1999, $675,000 for a 4,058 square foot parcel in 1999, $950,000 for the same 4,058 square foot parcel in 2001, and $1,300,000 for the same 3,562 square foot parcel in 2001.

[122] Subsequently, in 1991, the then owner of APN 028-481-03 became an owner of APN 028-481-04.

investment-backed expectation that he had purchased a developable lot. His minimal investment reflected that the lot's uses were limited to supporting the residential use on APN 028-481-04 and that it had little separate value apart from its connection to APN 028-481-04.

In addition, the expectation that APN 028-481-03 could be developed with a separate single-family residence would not be reasonable. To determine whether an expectation is reasonable, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have developed for the Applicant's proposed use, taking into account all the legal, regulatory, economic, physical and other restraints that existed when the property was acquired. Viewed objectively, a reasonable person would not have had a reasonable expectation that APN 028-481-03 could be developed with a separate residential parcel.

When the Applicant purchased the two lots in 1998, APN 028-481-03 was already being used to support development associated with the neighboring existing residence, leading a reasonable person to conclude that that was the appropriate use of the lot and that the lot was burdened with easements restricting its use for something different. A reasonable person also would have viewed the lot and investigated the physical constraints to development. This investigation would have revealed the lot's small size, its location in a hazardous and sandy beach area, and that a house on the site was destroyed in 1983.

A reasonable person also would have investigated the regulatory restraints that existed at the time, including the relevant LCP provisions applicable to the site (e.g., geologic hazards, visual resources, shoreline access, ESHA, etc.). When the Applicant purchased the property, the LCP prohibited new development of the type proposed in coastal hazard areas such as this site. LCP Policy 6.2.18 stated: "Prohibit New Structures In Coastal Hazard Areas. Prohibit new structures, public facilities, and service transmission systems in coastal hazard areas unless they are necessary for existing residences or to serve vacant lots which through lack of protection threaten adjacent developed lots, public facilities, public beaches or coastal dependent uses." In other words, unless necessary for existing residences (such as rip-rap to protect an existing residence), the LCP did not allow new structures at the site when the Applicant purchased the property.[123] A reasonable person also would have investigated the applicable Coastal Act policies that were discussed in the previous findings. Real estate agents and sellers familiar with the site likely would have informed a buyer that they did not believe it possible that the County and the Coastal Commission would have allowed residential development on APN 028-481-03 and that those agencies likely would have limited its use to the shoreline armoring present there, particularly given that that was a use of the site at that time and that the previous residence on the site was destroyed by storms over fifteen years prior to the Applicant's purchase. A prospective buyer also would have been aware of the pending coastal permit application for rip-rap on APN 028-481-03 to protect the house on APN 028-481-04, because that issue was being addressed by the Applicant's real estate agent during the time that the Applicant purchased the site in late 1998 (see CDP Application 3-97-005-DM). This information would have further informed the prospective buyer that shoreline protection for the

[123] This LCP policy was later amended as part of a larger comprehensive LCP update focused on geologic hazards (LCP Major Amendment 2-98) that was certified in July 1999.

house on APN 028-481-04 was the appropriate use of APN 028-481-03.

Finally, that the Applicant paid so little for APN 028-481-03 confirms that a reasonable person would not have had an expectation that the lot could be separately developed with a single-family residence. As discussed, the purchase price in 1998 for the two lots and the single-family house did not reflect any consideration for a second developable lot, and no reasonable person would have thought that he paid for one.

In summary on this point, the Applicant had neither a reasonable, nor an investment-backed, expectation that he could develop APN 028-481-03 with the separate residential structure that he is currently proposing.

Economic Impact. The second prong of the *Penn Central* analysis requires an assessment of the economic impact of the regulatory action on the Applicant's property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished (see *Tahoe-Sierra Pres. Council, Inc., supra,* [citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 [applying *Penn Central*, court finds that diminution of property's value by 91% not a taking]). In this case, the evidence demonstrates that the Commission's action would have little impact on the value of the Applicant's property, regardless whether the Applicant's two lots are regarded as a single parcel or two separate parcels.

If the Applicant's two lots are treated as a single parcel, the Commission's action has had little, if any, economic impact. The Applicant acquire the two lots for $675,000 and, even after the Commission's actions, the Applicant retains a single-family beachfront dwelling on one lot and may use the second lot to support his use of the other lot. It is likely that, even following denial, the value of the property would still exceed what the Applicant paid for it in 1998, and certainly the collective value of the two lots will not be significantly diminished, if it is diminished at all.

Alternatively, if APN 028-481-03 is treated as a distinct parcel for takings purposes, the Commission's denial of the Applicant's proposal would still have little impact on the value of that lot. As previously demonstrated, APN 028-481-03's value is in the neighborhood of $10,000, maybe a little more if one accounts for inflation since it was acquired in 1998. Even after the Commission's denial, APN 028-481-03 would continue to retain its limited value because it still may be put to a number of uses (such as shoreline armoring) in support of APN 028-481-04. It fairly may be assumed that a person acquiring APN 028-481-04 would pay, as both the Applicant and his predecessor did, about $10,000 to maintain those valuable uses. In these circumstances, it is reasonable to conclude the Commission's action would not have a substantial impact on the value of APN 028-481-04, and that it would have far less economic impact than other regulatory actions for which the courts have rejected taking claims.

Ad-Hoc Takings: Character of the Commission's Action. The final prong of the *Penn Central* test requires a consideration of the character or nature of the regulatory action. A regulatory action that is an exercise of the police power designed to protect the public's health, safety and welfare is much less

likely to effect a taking (*Keystone Bituminous Coal Ass'n, supra,* 480 U.S. at pp. 488-490; see *Agins v. City of Tiburon* (1980) 447 U.S. 255, 262) [land use regulation substantially advances government interest]; *Penn Central, supra,* 438 U.S. at p. 127), than, for example, a government action that is more like a physical appropriation of property (see *Loretto, supra,* 458 U.S. 419).

In this case, the Commission's denial of the Applicant's proposal promotes important policies that protect the public's health, safety and welfare. Detailed earlier in this report, these policies include the fostering of public safety from geologic and physical hazards, the preservation of scenic resources and community character, and the protection of public access and recreation as well as marine resources and habitat. All of these policies are the type of exercises of the police power that have long been thought to promote important governmental interests (e.g., *Agins, supra*). At the same time, the Commission's action involves no physical occupation or exactions of property interests and allows the Applicant to engage in the same land uses to which APN 028-481-03 is currently put. Consequently, application of the third prong of *Penn Central* strongly weighs against a finding that the denial of this project constitutes a taking.[124]

For all of these reasons, the Commission's denial of this project would not constitute a taking under the ad hoc *Penn Central* standards.

The Project Could Be Prohibited Under Background Principles of State Property Law

Finally, *Lucas* provides that a regulatory action does not constitute a taking if the restrictions inhere in the title of the affected property; that is, "background principles" of state real property law would have permitted government to achieve the results sought by the regulation (*Lucas, supra,* 505 U.S. at pp. 1028-1036). These background principles include a State's traditional public nuisance doctrine or real property interests that preclude the proposed use, such as restrictive easements. Here, the proposed project, if allowed, would constitute a public nuisance, and for this additional reason the Commission's denial of the project would not constitute a taking.

California Civil Code Section 3479 defines a nuisance as follows:

> *Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.*

California Civil Code Section 3480 defines a public nuisance as follows:

> *A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.*

[124] For much the same reasons, the Commission's action substantially advances a legitimate government interest, assuming that is an appropriate independent taking standard (see fn. 118 *supra*).

During a storm that flooded the site and the residential structure, the lower portion of the structure, the driveway/bridge, and all materials in the lower portion of the structure would all be washed into the storm surge. The degree to which such materials would be pulled free would depend upon the severity of the storm surge and flooding, with the amount of such materials displaced increasing as a function of the severity of the storm. In a large enough storm that scoured the site to established scour depth, the connecting utility lines on the Applicant's parcel and the public utility lines (particularly at the connection points) could be threatened. As described in the preceding "Geologic Conditions and Hazards" section, coastal flooding could wash the site every year, with more severe storms leading to more significant flooding every few years. Flooding that reached the driveway/bridge portion of the residential development would be expected to damage these structures fairly readily because they would be constructed atop sand and fill that are easily eroded if tidal surge and storm flooding were to reach them. Thus, this inland portion of the development could potentially be damaged as often as a yearly basis, causing debris (such as fill, pavement, concrete planks/beams, vegetation, etc.) to be strewn about the site and surrounding area. The remainder of the proposed development (i.e., the residence itself) would be expected to be spared from lesser flooding and storm surge events that did not reach +14 NGVD (i.e., the elevation of the top of the perimeter beam system, and the base elevation of the break away walls and garage floor). However, flooding associated with more significant storms that reached above +14 NGVD (such as those estimated to occur every few years to five years)[125] would be expected to not only damage the inland driveway/bridge area, but also to damage the collapsible elements of the residential structure (by project design), and wash through of the garage area (picking up stored materials as it did so). Thus, the residential structure portion of the development could potentially be damaged as often as every two to five years, where break-away walls, framing, connectors, concrete blocks, concrete planks/beams, pavement, as well as all materials located in the bottom level storage area (such as vehicles and other things typically stored in a garage like garbage cans, bicycles, household tools, paints, oil, solvents, etc.) would be expected to be a part of this debris stream. In sum, while a matter of degree in each storm case, the overall residential development could potentially be damaged on an almost yearly basis, with more significant damages occurring every two to five years.

Moreover, with the proposed concrete perimeter beam system, there will be an area below the concrete planks/beams and between the perimeter beams that would be exposed to storm and tidal surge in both winter and summer conditions. Ocean waters would extend under the beams at times and along the underside of the concrete planks of the garage, pushing through any openings.[126] This could suspend any materials on the garage floor and/or stored there (such as vehicular contaminants, bags of fertilizer, etc.), and/or wash the underside of vehicles themselves of similar residues, and cause significant degradation to water quality. In larger events, it could push the planks/beams themselves loose. The same scenario holds true for the concrete plank/beam driveway/bridge as well.

The materials displaced in these storm events, including possibly any sewage from the sewer line should it be opened and exposed, would be dispersed around the beach, into the Monterey Bay, onto East Cliff Drive, and into Moran Lake County Park. These materials would have a high potential to injure

[125] RJA 2000a.

[126] This would be similar to how rainwater passes through deck boards, although in the opposite direction.

pedestrians, bicyclists, motorists, and others using East Cliff Drive, the Park, the beach, or the near shore and offshore use areas. These materials could also injure habitat resources in both the Park and the Monterey Bay. In addition, these materials could damage the public infrastructure of East Cliff Drive and the Park, and block use of the beach, the Park and the road. They would also have the potential to damage adjacent structures, such as the Applicant's existing home. This would lead to additional costs that the public would bear for repairing damage to public facilities and perhaps private structures under government disaster relief programs.

Thus, the proposed project poses an unreasonable risk to public health and safety because, in the likely event of storm damage, debris and materials dislodged from the residential development on the property would endanger members of the public as well as public property and would obstruct the public's use and enjoyment of the beach, ocean-recreational areas, East Cliff Drive, and Moran Lake County Park. It is likely that a court would determine that this destruction, if it came to pass, would constitute a public nuisance under California law. Consequently, the Commission's denial of this project is based on one of those background principles of California law that preclude a finding that the regulatory action constitutes the taking of private property without just compensation.[127]

3. Conclusion

For all of the above reasons, the Commission concludes that its denial of the Applicant's proposal would not constitute a taking and therefore is consistent with Coastal Act Section 30010.

5. California Environmental Quality Act (CEQA)

Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and 15042 (CEQA Guidelines) of Title 14 of the California Code of Regulations (14 CCR) state in applicable part:

> ***CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects.*** *[Relevant Portion.] A public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed.*
>
> ***Public Resources Code (CEQA) Section 21080(b)(5). Division Application and Nonapplication.*** *…(b) This division does not apply to any of the following activities: …(5) Projects which a public agency rejects or disapproves.*
>
> ***CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are Disapproved.*** *(a) CEQA does not apply to projects which a public agency rejects or disapproves.*

[127] There may be other background principles of California property law that would preclude development on this site. For example, there are questions whether the public acquired rights in the project site under the doctrine of implied dedication based on continuous historic public use of the site. There is also a question whether the site is subject to an existing County-owned roadway easement (see "Existing Conditions and Background" section) that might preclude development. Because of the many independent grounds for denying a taking, the Commission need not address these and possibly other property issues here, although they may become relevant should the Commission's decision be legally challenged.

Section 13096 (14 CCR) requires that a specific finding be made in conjunction with coastal development permit applications about the consistency of the application with any applicable requirements of CEQA. This staff report has discussed the relevant coastal resource issues with the proposal. All above Coastal Act findings are incorporated herein in their entirety by reference. As detailed in the findings above, the proposed project would have significant adverse effects on the environment as that term is understood in a CEQA context.

Pursuant to CEQA Guidelines (14 CCR) Section 15042 "a public agency may disapprove a project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed." Section 21080(b)(5) of the CEQA, as implemented by section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects which a public agency rejects or disapproves. The Commission finds that denial, for the reasons stated in these findings, is necessary to avoid the significant effects on coastal resources that would occur if the project were approved as proposed. Accordingly, the Commission's denial of this project represents an action to which the CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, do not apply.